MAR 29 1890

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 252.

SYLVESTER H. KNEELAND, *Appellant*,

vs.

THE AMERICAN LOAN AND TRUST COMPANY OF BOSTON et al.

No. 1537.

SYLVESTER H. KNEELAND, *Appellant*,

vs.

GEORGE WILLIAM BALLOU, Trustee.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLANT.

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Supreme Court of the United States.

OCTOBER TERM, 1889.

SYLVESTER H. KNEELAND, Appellant, vs. THE AMERICAN LOAN AND TRUST COMPANY OF BOSTON, THE GRANT LOCOMOTIVE WORKS, and D. B. PAUL, Trustee, ET AL.	No. 252. Appeal from the Circuit Court of the United States for the District of Indiana.
SYLVESTER H. KNEELAND, Appellant, vs. GEORGE WILLIAM BALLOU, Trustee.	No. 1537 Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF APPELLANT.

Statement of Facts.

1. The Toledo, Cincinnati and St. Louis Railroad Company—formed by the consolidation of various constituent railroad companies of the States of Ohio,

Indiana and Illinois—owned and operated the Narrow Gauge Railroad System extending from Toledo, Ohio, to East St. Louis, Illinois, and to Cincinnati and Ironton on the Ohio River.

The history of the several organizations, and of the execution of their respective mortgages, is so fully set forth in the brief of Mr. Butler, of counsel for appellant, that it is unnecessary to repeat it in this connection.

A general idea of the location of the road, and of its different divisions, may be gained from an examination of the map, found at page 178 of the Record in *Kneeland vs. Ballou*, No. 1537.

2. There were nine separate mortgages and nine mortgage divisions of the railroad—all mortgages having been executed by constituent companies. No general mortgage upon the entire railroad was executed by the Consolidated Company.

The nine mortgages above mentioned secured bonds aggregating $10,500,000—$10,200,000 of which were outstanding. There were seven additional mortgages on the various divisions of the system, securing, in the aggregate, $9,250,000 of second mortgage and income bonds (Record, No. 252, p. 6). The total mortgage indebtedness was, therefore, $19,450,000 on 783½ miles of uncompleted narrow gauge railroad. All of the mortgages were duly recorded, at the time of their execution, in the proper counties.

August 1st, 1883, when application was made by an unsecured judgment creditor for the appointment of a Receiver, The Toledo, Cincinnati and St. Louis Railroad Company was indebted as follows:

First Mortgage Bonds	$10,200,000 00
Second Mortgage Bonds	9,250,000 00
Equipment Bonds	2,002,135 60
Unpaid interest on First Mortgage Bonds	816,000 00
Funded interest on First Mortgage Bonds	178,000 00
Debenture Bonds	964,000 00
Supplies	300,000 00
Labor (Pay-rolls)	200,000 00
Total	$23,910,135 60

Record, No. 252, pp. 5–9, 91.

Default was made on the first mortgage January 1st, 1883, and July 1st, 1883. The Consolidated Company never paid operating expenses or interest, the property not being worth 25 per cent. of the mortgages.

Of the above indebtedness there was past due at the time of the appointment of the Receiver, the following:

Interest on First Mortgage Bonds	$994,693 50
Interest on Equipment Bonds	14,818 00
Over-due Equipment Bonds	221,200 00
Supplies	300,000 00
Labor (Pay-rolls)	200,000 00
Total	$1,730,711 50

Record No. 252, pp. 8, 9, 92.

It will thus be seen, as alleged in the creditor's bill, as admitted in the railroad company's answer, and as shown by the various reports of the Masters, that at

the time of the appointment of the Receiver, the defendant company was wholly, hopelessly and notoriously insolvent, and never had earned, and was not then earning, enough to pay for labor and supplies—not to mention car-rentals, taxes and interest. It had defaulted, more than once, upon every class of its indebtedness. It was in default to these appellees, and had been for a long time. Every equipment lease had been forfeited, and every owner of rolling stock was entitled to remove his property, long before the Receiver was appointed. Yet, as shown by the intervening petition of each of the appellees, equipment owners preferred to leave their property in the possession of a railroad Receiver, who could not operate his property for a day except at a loss. No one knew of this inevitable loss better than the owners of rolling stock, who were already creditors to the extent of two million dollars, and whose claims, to the amount of more than $235,000 were past due and unpaid.

Record No. 252, pp. 10, 92, 34, 75, and Intervening Petitions of Appellees.

3. August 1st, 1883, Grenville D. Braman, an unsecured judgment creditor of the Consolidated Company, that is to say, of The Toledo, Cincinnati and St. Louis Railroad Company, having on the 30th day of July, 1883, obtained a judgment in the Court of Common Pleas of Montgomery County, Ohio, upon which execution was issued and immediately returned unsatisfied, filed bills in the United States Circuit Court for the Northern District of Ohio, Western Division, and in the United States Circuit Court for the District of Indiana, and in the United States Circuit Court for the Southern

District of Illinois; and upon his application, one Edward E. Dwight was appointed Receiver of the entire Narrow Gauge System of The Toledo, Cincinnati and St. Louis Railroad Company in the three States of Ohio, Indiana and Illinois.

The order appointing the Receiver directed him to take possession of, maintain and operate the railroad and premises of The Toledo, Cincinnati and St. Louis Railroad Company, and clothed him "with all the authority and rights usually given to a Receiver by courts of equity, to take charge of, care for and operate a railroad," and required him "to collect and receive the tolls, incomes, issues, rents and profits of said premises, *and out of the same* to maintain and keep the property safe and in good repair."

Record No. 252, p. 15.

The Receiver so appointed operated the entire railroad, as such judgment creditor's Receiver, until the 1st day of November, 1883. At that time he was discharged as Receiver of the divisions of said railroad situated in the Southern District of Ohio. He continued as Receiver of the divisions extending from Toledo, Ohio, to East St. Louis, Illinois, until the 1st day of December, 1883.

November 28, 1883, William J. Craig was appointed Receiver, *in the judgment creditor's suit*, of the main line extending from Toledo to East St. Louis, Illinois.

He took possession December 1st, 1883, and continued as such Receiver until January 1st, 1885, which is the close of the period covered by appellees' claim for car rentals.

4. The foregoing statements relate to the Receivership under an unsecured judgment creditor's bill. It now becomes important to consider the concurrent Receivership under the bills filed by the Trustee to foreclose the mortgages.

October 20, 1883, the Central Trust Company, trustee in the various mortgages heretofore referred to, brought independent suits in Ohio to foreclose the mortgages on the Ohio Division, and also brought suit at Toledo, Ohio, and Indianapolis, Indiana, to foreclose the mortgage on the Toledo Division, extending from Toledo, Ohio, to Kokomo, Indiana.

Record No. 252, p. 25.

November 27, 1883, an order was entered at Indianapolis in the action to foreclose the mortgage on the Toledo Division, reciting that a Receiver of the same property had theretofore been appointed under the creditor's (Braman's) bill, and extending the Receivership, "already existing" in the creditor's suit, over the premises and property sought to be foreclosed in the trustee's action.

Record No. 252, p. 72.

On the following day W. J. Craig was appointed Receiver in both of these suits (*i. e.*, the creditor's suit and the suit to foreclose the Toledo Division mortgage) and vested with all the powers formerly conferred upon E. E. Dwight. The order of appointment provides that :

> "William J. Craig be, and he hereby is ap-
> "pointed Receiver in the place and stead of the
> "said Dwight, of all the property and assets which

" were of the said defendants, for a more particular
" description of which reference is made to the bill
" of complaint filed herein, and which has passed
" into the possession and under the control of said
" Dwight, as Receiver; which property and assets
" the said Dwight is hereby directed to turn over
" to the said William J. Craig, as his successor, on
" the first day of December, 1883; and it is fur-
" ther ordered that upon the filing of a bond by
" the said Craig in the sum of fifty thousand dol-
" lars conditioned for the faithful discharge and
" performance of his duties as such Receiver, the
" said Craig shall be, after the 30th day of Novem-
" ber, instant, vested with all the usual rights and
" powers of Receivers in such cases, and especially
" of all the rights and powers which were hereto-
" fore conferred upon the said Dwight as such Re-
" ceiver."

Record No. 252, p. 73.

June 16, 1884, one Leonard, a bondholder, brought suit to foreclose the mortgage upon the St. Louis Division, extending from Kokomo, Indiana, to East St. Louis, Illinois; on the following day the Central Trust Company, as Trustee under the same mortgage, filed its bill of foreclosure; and the two cases were subsequently consolidated. *No Receiver was ever appointed in either of these cases.*

Afterwards, to wit, on or about the 1st day of August, 1884, the various divisions of the Narrow Gauge System in the Southern District of Ohio were sold and severed from the remainder of the system, leaving the line from Toledo, Ohio, to East St. Louis, Illinois. William

J. Craig remained the Receiver, under the appointments aforesaid, until July, 1885, at which time John McNulta was appointed Receiver of the line from Toledo to East St. Louis, and so remained until the property was sold and delivered to the purchaser, Sylvester H. Kneeland, who purchased the line from Toledo to East St. Louis for himself and as Trustee for the other first mortgage bondholders.

5. No attempt is here made to state the situation of the various foreclosures and Receiverships upon the divisions of the railroad situated in the Southern District of Ohio. The questions presented in the cases at bar arise solely out of proceedings affecting the line from Toledo to East St. Louis.

In order to a better understanding of the questions, the different Receiverships of the line from Toledo to East St. Louis should be clearly stated:

I. Receivership under Creditor's Bill.

1. Of Toledo Division (Toledo to Kokomo) from August 1st to December 1st, 1883.

2. Of St. Louis Division (Kokomo to East St. Louis) from August 1st, 1883, to January 1st, 1885.

II. Joint Receivership under Creditor's Bill and Trustee's Foreclosure Bill.

1. Of Toledo Division from December 1st, 1883, to January 1st, 1885.

2. Of St. Louis Division—none.

It will thus be seen that the creditor's Receiver operated the Toledo Division from August 1st to December 1st, 1883, and the St. Louis Division from August 1st, 1883, to January 1st, 1885; that the Receiver, acting under appointment in both the creditor's suit and the foreclosure suit, operated the Toledo Division from December 1st, 1883, to January 1st, 1885; and that in the mortgage foreclosure proceedings no Receiver was appointed for the St. Louis Division.

6. At the time Receiver Dwight took possession of the Narrow Gauge System, August 1st, 1883, there was upon the same a large number of cars and locomotives, some of which were owned by the Railroad Company, but the great majority of which, before that time, had been leased by the appellees to some of the constituent companies and to the Consolidated Company. These leases were in the usual form—that is to say, conditional purchases by installments, the title to remain in the lessors until all the installments should be paid; if all the installments were not paid, then those that were paid should be considered as rent; and if all paid, then payments were to be taken as purchase money, and the title should vest in the Company.

At that time there were nearly $250,000 due the owners of cars under such conditional sales, and the Narrow Gauge System, as set forth and as admitted, and as found by the Master, was not able to pay its running expenses without rentals; all of which was, at that time, known to the owners of the cars.

It also appears from the pleadings and evidence that the Consolidated Company had never been able to pay a cent of interest, and that none of the constituent

companies had paid any interest for upwards of a year—at least two installments of interest on every mortgage being past due.

The evidence also shows that there was then due the appellees in this case, on account of installments, or rentals for cars, over $140,000; and further, that to these same appellees installments came due on the 1st of August, 1883, the very day on which said Dwight was appointed Receiver, amounting to $92,000; so that the whole sum then due to these appellees for car rentals or installments was over $230,000, and, with interest added, approximated $250,000.

It further appears that at the time of the appointment of Dwight as Receiver, the system was not completed—the road not being finished to St. Louis, nor the connections made by which it would finally reach Cincinnati.

The evidence also shows that at the time of the appointment of the Receiver, the road owed over $107,000 to its employees for the month of June, and something near the same amount for July. At the same time there was also due for supplies the sum of at least $300,000. So that at the time of the appointment of the Receiver, it was known to all parties concerned, that the Narrow Gauge System could not pay its car rentals or installments under the leases—could not pay its employees, and could not pay for the ordinary supplies; and, as alleged in the bill and never denied in the history of the case, the average monthly earnings of said line of railway were not sufficient to pay the current expenses of operation, and as a matter of fact, not sufficient to pay one-half.

In other words, the condition of this property was

such (Record No. 252, p. 201) that at the expiration of the first eleven months of the Receivership, the Receiver's estimated liabilities (without counting taxes or Receiver's Certificates) exceeded the assets by $799,571.64, and of this $403,997 was for the rental of cars. Deduct car rentals from the gross deficit, and we have $395,574.64 as a deficiency, without the payment of any rentals. So that, if all of said cars had been furnished for nothing, and kept in repair by the owners, the result of operation would have been a debt of nearly $400,000. This is exclusive of the court expenses of the Receivership and taxes during the same period—the latter item of which would amount to not less than $100,000, being more than $50,000 on about two-fifths of the mileage of the road.

Record No. 252, p. 216.

The general result of the Receivership on the 1st day day of July, 1884, was that the mortgaged estate had become burdened with a debt which the Special Master, J. D. Cox, appointed to ascertain the same, computed at about $1,000,000.

Record No. 252, pp. 202, 203.

7. It was alleged in the bill filed by Braman on the 1st day of August, 1883, and admitted in the answer filed by the Railroad Company, that the Company was unable to pay installments on car leases, or rentals, and that all the bonds issued in that behalf amounted to about $2,000,000; and further, that in all probability the owners or lessors would withdraw the cars. But the Court in its appointment of said Edward E.

Dwight, Receiver, made no order whatever respecting the leased cars, or the cars in possession of the Company conditionally purchased, but left the owners of cars at liberty to take such course as they might see proper.

Record No. 252, p. 14.

At that time it was known to the owners of the cars that narrow guage railroads were extremely unpopular, and the failure of The Toledo, Cincinnati and St. Louis System demonstrated that the prejudice was well founded. By reason of such failure there was no demand for narrow guage rolling stock, and the owners found themselves without any other market.

Record No. 252, p. 211.

8. It should be borne in mind that Braman, upon whose application the Receiver was appointed, was simply a general unsecured creditor. Upon a cause of action not disclosed, he obtained a judgment for $5,627.70 in the Court of Common Pleas of Montgomery County, Ohio. Execution was issued upon the judgment, but no levy was made, the execution being returned *nulla bona* the same day it was issued. No part of the railroad involved in the case at bar—that is, the line from Toledo to East St. Louis—is located in Montgomery County, Ohio. At best, Braman had but a judgment lien upon such part of the Ohio Divisions (not involved in this case) as lie in Montgomery County. He had no possible lien of any kind upon the property in Illinois or Indiana, and none upon that part of the Toledo Division situated in the Northern District of Ohio.

Braman shows by his own allegations that he was not entitled to the appointment of a Receiver. Having no lien himself, he sets out existing mortgage incumbrances and other liabilities to the amount of several million dollars, and then alleges the hopeless insolvency of the Railroad Company, and charges "that "the property is insufficient to pay the liens thereon."

Record No. 252, p. 10.

The relief prayed for by Braman is:

> "That the Court will appoint a Receiver and "order him to take possession of and protect said "line of railway and of the property of said The "Toledo, Cincinnati and St. Louis Railroad Com- "pany, defendant herein, and to operate its said "line of railroad until the further order of the "Court herein; also that as soon as may be, said "line of railroad and property appurtenant there- "to, or connected therewith, may be sold as an en- "tirety to satisfy said complainant's lien and the "liens and debts of other creditors, according to "their priority, and for such other and further "equitable relief as justice may require."

9. The Receiver having taken possession under the creditor's bill, and continuing in the possession and operation of the railroad under the various orders above set forth, the several equipment owners afterwards intervened and presented their respective claims.

When the Receiver took possession, he found upon the railroad a large number of engines and cars belonging to the appellees, which were in the possession of the railroad company under the car trust leases. *No order was made by the Court concerning this equip-*

ment, until the order was entered for its delivery to the owners. The Receiver was not authorized to carry out the existing contracts made with the railroad company; he was not authorized to make any new contracts, either for the purchase, rental, or use of this equipment. He simply found it upon the railroad which, as Receiver, he was directed to take possession of; and the owners of such equipment, although having the right to retake the same, preferred to leave it upon the raidroad after the appointment of the Receiver.

As shown by the tables of mileage of these engines and cars (Record No. 1537), a large part of this rolling stock was idle practically the entire time. Some of it was never used by the Receiver. Not one piece of it contributed to the value of the mortgage estate—it simply contributed to the loss. The railroad company owned rolling stock sufficient for the economical operation of the road by the Receiver with a view simply to the preservation of the property (Record No. 252, pp. 205–208). The car trust equipment was left in the possession of the Receiver, because the owners had no other use for it; and their property having depreciated in value upwards of forty per cent., by reason of the failure of the narrow gauge systems of the country, they sought to compel the Reciver to carry out the advantageous contracts they had previously made with the railroad company. This is apparent from the finding and report of the Master upon this subject, and the statements made by the Receiver. The Master's report finds (Record No. 252, p. 211):

> "That the opinion of railway experts tends
> "to regard narrow gauge railroads as unable to

" compete successfully with those of the standard
" gauge; that this opinion has become prevalent of
" late, and that it affects the value of such roads
" *and of the rolling stock* adapted to them by
" lessening the demand for them in the market,
" making a difference of 30 or 40 per cent. in the
" probable selling price of rolling stock exclusively
" adapted to narrow gauge roads, less than that of
" similar construction and original cost adapted to
" standard gauge roads. And that this discrediting
" of narrow gauge roads came to a head about the
" time of the appointment of the Receiver in these
" cases, and that the embarrassment of the T., C. &
" St. L. R. R. Co. was an important factor in such
" discrediting and in the consequent depreciation in
" the value in the market of such narrow gauge
" rolling stock."

And the Receiver, referring to this finding by the Master, and to the value of the equipment in the Receiver's possession, says (Record No. 1,537, p. 198):

" If this be so, here are more than 3,500 cars
" and locomotives which, by the failure of this road,
" become comparatively worthless because they can
" be used on no other gauge, and because this gauge
" will not much longer demand them. The total
" cost of this equipment was about $2,000,000, and
" is represented by equipment bonds sold at par.
" *The equipment bondholders say that they do not de-*
" *sire to take back the cars* because they furnished
" them, under the terms of the contracts, in good
" faith, and expected to receive in money the
" amounts nominated in the bonds. Early in this

" Receivership an attempt was made by the trus-
" tees' attorney to so compromise this matter as that
" substantial justice might be done both parties. In
" the attempted compromise it was proposed that
" the equipment owners should finally receive a con-
" siderable proportion of the original cost, and the
" equipment bonds be cancelled. It were better,
" perhaps, that such settlement had been consum-
" mated, as it is probable that in the end all parties
" would have been as well off, and everybody in
" every way connected with the property would
" have been saved many vexations. The sit-
" uation was, however, without precedent, and
" *the equipment owners urged that they had*
" *a right to expect that the contract executed by the*
" *Railroad Company, for which they had specially*
" *prepared this equipment, would be carried out or en-*
" *forced by law. They did not accept the opportunity,*
" and with the increased financial depression of the
" country, it has month by month become more and
" more apparent that an adjustment of the question
" cannot be made to the satisfaction of all parties."

This statement by the Receiver is in accord with the actual transactions as disclosed by the record. No owner of rolling stock took any steps to assert any claim until the 5th day of November, 1883.

THE UNITED STATES ROLLING STOCK COMPANY on that day filed a petition (Record No. 252, p. 35) in the Braman case, setting out its equipment lease with the railroad company, alleging non-payment in accordance with the terms of the lease, and asserting that all the rights of the defendant company

under the lease had become forfeited, and that the American Loan and Trust Company, as assignee of the lease for the petitioner, was entitled to retake possession of all the cars without notice, to sell the same and apply the proceeds to the payment of the bonds and coupons, the principal of all of said bonds having become due and payable by reason of the default.

The petitioner did not ask that the Receiver be permitted to use the cars upon payment of a fair rental, but demanded specific performance of its contract of lease. Although it asserted that all rights of the company had been forfeited by reason of the default, it offered, notwithstanding the default and forfeiture, to permit its cars to continue in the possession of the Receiver, provided that payment should be forthwith made by the Receiver to the petitioner for that part of the contract price past due; and provided, further, that the Receiver should make prompt and full payment of the remaining installments of the contract price, together with interest thereon, as evidenced by said bonds and coupons, as the same should from time to time mature; and provided, further, that the Receiver should faithfully keep and observe all and singular the remaining covenants and undertakings of the defendant company as set forth in the lease.

The petitioner asked that without prejudice to its rights under the lease, an order might be entered requiring the Receiver to forthwith pay the amount past due, ($24,000), with interest, and that the Receiver might be further ordered and directed to promptly pay the remaining installments to become due under said lease, with interest.

Substantially similar petitions were filed by the

United States Rolling Stock Company in the foreclosure cases on March 13, 1884, and June 17, 1885.

Record No. 252, pp. 34, 112, 418.

DAVID B. PAUL filed a similar petition, praying specific performance of his contract in the Braman case December 8, 1883, and in the foreclosure cases March 13, 1884, and June 17, 1885.

Record No. 252, pp. 75, 105, 410.

PENNOCK BROTHERS filed substantially similar petitions, praying specific performance of their contract, in the Braman case June 21, 1884, and in the foreclosure cases June 21, 1884, and June 17, 1885.

Record No. 252, pp. 173, 169, 429.

THE AMERICAN LOAN AND TRUST COMPANY and E. B. PHILLIPS, TRUSTEE, filed intervening petitions in the Braman case June 27, 1884, in which they set forth their contract and asked for the delivery of their rolling stock. But no application was made to the Court for the delivery of the equipment until the 1st day of December, 1884, when an order was immediately entered for such delivery.

Record No. 252, pp. 182, 186, 292, 294, 296.

R. S. GRANT, THE GRANT LOCOMOTIVE WORKS and the AMERICAN LOAN AND TRUST COMPANY filed their intervening petitions in the foreclosure cases on October 23, 1884, claiming the full value of the equipment furnished under their leases, with interest thereon, and asking for an order that the Receiver pay the same.

Record No. 252, pp. 262, 267.

GEORGE WILLIAM BALLOU, TRUSTEE, filed intervening petitions January 7, 1886, setting up his equipment contracts and claiming compensation for the use of his cars and for cars destroyed and for necessary repairs.

Record No. 1537, pp. 1–21.

It will thus be seen that none of the conditions upon which the appellees expressed their willingness to permit the equipment to remain in the possession of the Receiver was ever complied with, and no authority was ever conferred upon the Receiver to take, or use, or pay for any part of the equipment not owned by the Railroad Company, so left in his possession.

10. November 28, 1884, a committee of the first mortgage bondholders, having been made co-complainants in the suit, filed a petition setting forth (Record No. 252, p. 290), that the Receiver was using a large amount of engines and freight and passenger-cars belonging to sundry persons and corporations who were claiming therefor exorbitant and unreasonable sums of rentals, and who were claiming further that their said engines and cars were held by said Receiver on monthly rental; and the petition alleged that said Receiver had not arranged with the owners thereof for the use of such equipment upon fixed and reasonable terms, but was simply using the same without any contract whatever, while the plain and manifest duty of the Receiver was not to use said equipment at all, unless he could rent the same on the mileage basis, insuring to said Receiver that no loss should occur even if nothing was earned; and that the owners of said equipment were intending to make large claims and de-

mands against said Receivership for the use of said equipment and on account of rental thereof and damages thereto; and that said Receiver had been paying nothing whatever toward the rental of said equipment during the Receivership, and had not even earned sufficient to do any more than pay his payrolls and supplies, outside of rental, fuel and proper repairs. The petitioners further alleged that the Receiver admitted that it was impossible for him to operate said road within the income that could be derived therefrom.

The petitioners asked that the Receiver might be ordered to sever and separate the engines, cars, equipment and moveable property belonging to each of the several divisions, and that instantly upon making such division and separation of said rolling stock, equipment and moveable property, the said Receiver might, by order of the Court, be ordered and directed to surrender to the proper owners thereof, and notify them to remove from said road, all rolling stock, engines, cars and equipment, then in his possession, not belonging to and a part of the property for which he was Receiver.

In accordance with the prayer of this petition, and upon full hearing, at which were present representatives of equipment owners, most of whom were active in opposing such order, the Court found (Record No. 252, p. 300) that the contracts under which the equipment was held by the Railroad Company were contracts of conditional purchase and sale; that no such demand had been made by the intervening petitioners and other holders of car-trust leases, or any or either of them, to retake possession of said engines, cars and equipments, and no

such refusal to grant possession thereof had been made by the Court or its Receiver, as to work a conversion of said engines, cars and equipments, or any part thereof, and that there was no legal or equitable obligation resting upon the Court or its Receiver to specifically perform and comply with the terms and obligations of said contracts of conditional purchase and sale; and that the several intervening petitioners, and other holders of car-trust leases, were entitled to the immediate possession of said cars, engines and equipment.

It was, therefore, ordered that the Receiver, on or before the 1st day of January, 1885, surrender and deliver to the several intervening petitioners, and to the other holders of car-trust leases, all locomotives, tenders, cars and equipment known by said Receiver to belong to, or be the property of, said intervening petitioners and other holders of car-trust leases.

The Receiver notified the various equipment owners of the entering of this order, and in accordance therewith, delivered the equipment on the 1st day of January, 1885.

11. Upon this state of facts, the appellees claimed the right to recover rental for the use of their equipment by the Receiver from the 1st day of August, 1883, to the 1st day of January, 1885; and, there being no earnings out of which the rental could be paid, but, on the contrary, a large deficit, exclusive of car-rentals, appellees also claimed that they were entitled to the payment of such rental out of the proceeds of the sale of the mortgage estate.

The matter was referred to a Master, who reported

in favor of such rentals, fixing the amount thereof. Exceptions were filed to such report by appellant and parties in like interest, duly presenting the questions hereinafter stated.

Record No. 252, pp. 501, 502, and Record No. 1537, p. 30.

Thereupon decrees were entered in favor of appellees, finding the several amounts due from the respective divisions, and ordering the payment by appellant, into the Registry of the Court, of the sum of $158,708.89 for the use of the appellees in Case No. 252, and the sum of $59,753.76 for the use of appellee Ballou in Case No. 1537.

The decrees further provided that the appellees should have and recover the amount so found due them, with interest at the rate of six per cent. from the date of such decrees; and that the amount so found due them should be a prior and paramount lien upon all the railroad property and effects of every nature and kind pertaining to each of said divisions respectively, and prior to the rights and interests of the bondholders and purchasers thereof, and of all persons claiming by, through or under them or either of them; and that said sums should be paid out of the proceeds of the foreclosure sale of said divisions prior to any distribution of the proceeds among the holders of the bonds secured by the mortgages thereon.

Record No. 252, p. 570, and Record No. 1537, p. 33.

From these decrees appeals were taken by Kneeland for himself and associates, first mortgage bondholders.

12. Not only was there no diversion of earnings from operating expenses, either by the Railroad Company or by the Receiver, but there never were earnings sufficient to pay debts incurred for labor and supplies. Almost every page of the records discloses the fact of continuous and inevitable loss and a constantly increasing deficit.

These facts were at all times known to the equipment owners. Ballou had been for years the financial agent of the Railroad Company. So intimate was his connection with the enterprise that the officers of the Railroad Company acted as *his* agents at the time he leased his rolling stock to the company (Record No. 1537, p. 69). Phillips was the former president of the same company. The equipment leases had long been in default.

The importance of establishing net earnings as a basis for their recovery of rentals was early recognized by owners of rolling stock, as was the importance of showing that the use and employment of the equipment were necessary to the operation of the road.

Upon the coming in of the report of Special Master J. D. Cox on the subject of car-rentals, different equipment owners filed exceptions to the same. Notwithstanding the fact that an attempt had been made before the Master to prove that the use of this equipment was necessary in order to enable the Receiver to operate the railroad, and that the Receiver had earnings sufficient to pay the rentals for the same, the Master did not find in accordance with that contention made by the equipment owners.

Chief among the exceptions filed by the United

States Rolling Stock Company, Pennock Bros., David B. Paul, the American Loan and Trust Company, and E. B. Phillips, Trustee, were the following:

> "For that the said Master has not found that the continued use and employment of the rolling stock included in the equipment leases described in said petition are necessary in the operation of said railroad, whereas the proofs submitted to the Master show that such continuous use and employment were necessary to such operation, and the Master should have so found.
>
> "For that the said Master has not found that there was a diversion of the income and earnings of this defendant company, the mortgagor in the above-entitled case, prior to the appointment of the Receiver herein, which earnings should have been applied to the payments due said petitioner on account of such rolling stock and the leases thereof, but were diverted by said defendant company to other purposes.
>
> "For that the said Master has not found that there was a diversion of the income and earnings of the defendant company, the mortgagor in the above-entitled cause, subsequent to the appointment of the Receiver herein, which earnings should have been applied to the payments due said petitioner on account of said rolling stock and the leases threof, but were diverted by said Receiver to other purposes"
>
> (Record, No. 252, pp. 256–262).

It was never found by any Master or by the Court during the history of the case, that there were earnings

sufficient to pay operating expenses, or that there had been a diversion of earnings, or that the use of the leased equipment was essential to the operation of the railroad by the Receiver, or that such use contributed to the value of the mortgaged property. On the contrary, the reports of Special Master Cox, and the numerous reports of the Receiver found in the record, clearly show that the earnings were not sufficient to pay claims for labor and supplies; that the earnings had been strictly devoted to the payment of operating expenses; and that the use of the equipment, instead of contributing to the value of the mortgage estate, simply contributed to its depreciation.

Although this is shown generally through all the reports of the Masters and Receivers, it is shown specifically in the joint report of Special Masters Fishback and Ricks. Upon these questions this report finds:

> "THIRD. We are further required to report as to whether any of the earnings of the Toledo, Cincinnati and St. Louis Railroad Company were, during the period commencing six months before the appointment of said Dwight Receiver, and ending on the 1st of August, 1884, diverted from the payment of labor and suppiles—*i. e.*, from the payment of operating expenses.
>
> "FINDING. We have examined the books and records of the Receivers and of the company in the possession of said Receivers personally and with the aid of accountants, and find that there was no diversion of the earnings of said road during the period named from the payment of operating expenses. Our investigations on this

point fully confirm the reports heretofore made by Special Master J. D. Cox and the Receivers, that no such diversion was made.

"We are further ordered to report as to whether any net earnings were ever made by said Railroad Company, or by said Receivers, or either of them, during the period aforesaid.

"FINDING. We report, in response to the above inquiry, that the books examined as above stated show, not only that no net earnings were ever made, but that there was a large deficit for the period named."

(Supplement to Record No. 252, p. 4.)

Assignment of Errors.

The decrees of the Court below are erroneous:

FIRST. BECAUSE CLAIMS FOR THE USE OF ROLLING STOCK TAKEN BY A RECEIVER, WITHOUT PREVIOUS CONTRACT, AND USED BY HIM WITHOUT AUTHORITY OF COURT, WERE AWARDED PRIORITY OF PAYMENT OUT OF PROCEEDS OF SALE OF MORTGAGED PROPERTY, IN PREFERENCE TO FIRST MORTGAGE BONDS, ALTHOUGH THE USE OF THE EQUIPMENT WAS NOT ESSENTIAL TO THE OPERATION OF THE RAILROAD AND CONTRIBUTED NOTHING TO THE VALUE OF THE ESTATE, AND THERE WAS NO DIVERSION OF EARNINGS FOR THE BENEFIT OF THE MORTGAGED PROPERTY.

SECONDLY. BECAUSE SUCH CLAIMS FOR USE OF ROLLING STOCK, AGAINST A RECEIVER APPOINTED ON THE APPLICATION OF A CREDITOR WHO HAD NEITHER LIEN NOR SECURITY OF

ANY KIND, WERE AWARDED PRIORITY OVER FIRST MORTGAGE BONDS OUT OF THE *corpus* OF THE MORTGAGE ESTATE.

THIRDLY. BECAUSE THE ALLOWANCE FOR USE OF ROLLING STOCK WAS BASED UPON MONTHLY RENTALS, INSTEAD OF UPON THE USUAL AND EQUITABLE MILEAGE BASIS REPRESENTING THE ACTUAL SERVICE OF THE EQUIPMENT.

ARGUMENT.

Are claims for the use of rolling stock taken by a Receiver without previous contract, and used by him without authority of Court, entitled to priority of payment out of proceeds of sale of mortgaged property, in preference to first mortgage bonds, when the use of the equipment was not essential to the operation of the railroad by the Receiver, and contributed nothing to the value of the mortgage estate, and there was no diversion of earnings for the benefit of the mortgaged property?

Where the owners of rolling stock have made a contract of lease or conditional sale with a railroad company, and the company has had possession and use of the cars, then, if the property is taken possession of by the Court, such rentals may be paid to the extent of a diversion of earnings for the benefit of the mortgage bondholders. In other words, if earnings have been diverted, they must be restored, and out of that fund the rentals of cars, together with other debts incurred in the operation of the road, may be paid.

The Court will not interfere with the lien of the first mortgage, with the *corpus* of the property, unless it appears that the earnings have been diverted for the

benefit of the mortgage estate, leaving operating expenses unpaid. There must be a restoration to the extent of the diversion. The diversion must have been for the benefit of the bondholders, and the restoration must be for the benefit of, and limited to, those who added to the value of the mortgaged property.

In the cases at bar, the Railroad Company had possession of the rolling stock, and had been using it, for many months before the appointment of the Receiver. Had a settlement been made by the Court when the Receiver was appointed, between the Railroad Company and the owners of cars, nothing would have been paid for car rentals unless it could have been shown that earnings had been diverted for the benefit of bondholders. No claim that such earnings were diverted has been, or can be, truthfully made.

After the Receiver took possession of the rolling stock, no contract was entered into between the owners of the equipment and the Receiver. No agreement or understanding was made or had between such owners and the Receiver, either with or without the sanction of the Court. The equipment owners left their property upon the railroad, notwithstanding forfeiture of the leases and default in payment of installments and rentals, because they had no other market for their property. The Receiver found it there and was compelled to use it. As shown by his reports and correspondence (Record, No. 1537, p. 148), he had not sufficient side-tracks for its storage, and was compelled to keep it moving to prevent a blockade. As heretofore shown in this brief (*supra*, p.), the equipment owners informed the Receiver that they did not desire to take back their cars, and insisted that

they expected the contract executed by the Railroad Company to be carried out and enforced by the Court. The Receiver, therefore, used the cars without any agreement, express or implied, and without any understanding whatever in regard to the same.

The Receiver, at best, simply took the place of the Railroad Company, and his obligation to the owners of the cars for the use of the same was no greater than, and not different from, that of the Railroad Company.

If, then, he sustained the same relation to the owners of the cars that the company had sustained, he would only be bound to pay the rentals out of the earnings; and if there were no earnings, the Receiver could not be held liable to pay; and if there had been earnings, the *corpus* would be liable only to the extent that such earnings were diverted for the benefit of bondholders.

The owners of the cars, or their trustees, filed petitions, asking the Court to carry out the contract that had been made between them and the Railroad Company. They also insisted that the Court should order the payment of installments due at the time the Receiver took possession. They claimed specific performance of their contracts. They asked no rentals—asked no authority to the Receiver to use equipment—and represented that they consented to their rolling stock remaining upon the railroad only upon condition that the Court should forthwith pay the past due installments and should order the payment of future installments as they matured.

These petitions were simply filed. No action was taken thereon; no orders were made by the Court. The

Court never accepted the conditions, and never consented to the use of the rolling stock. Under the contracts existing between the owners of the cars and the Railroad Company, the owners had the right to remove their cars and to declare the contract broken. They did not insist upon their rights—they simply allowed the cars to remain.

Under these circumstances, we insist that the Receiver occupied the exact position of the Railroad Company, so far as liability for the use of the cars was concerned; and that the Court should have found as to the rental of cars precisely as though the Company itself had used them.

As a matter of fact, the bondholders themselves were the first to insist that the owners of cars should remove them, and it was at the instance, and upon the insistence, of the bondholders that an order was finally made directing the removal.

Record No. 252, p. 300.

Under these circumstances, appellant contends that the cases at bar come clearly within the principles announced by this Court in *Union Trust Co. vs. Illinois Midland Co.*, 117 U. S., 460; and that a claim for rentals of cars used by a Receiver, under the circumstances detailed, is not entitled to priority of payment out of the *corpus* of the mortgage estate in preference to first mortgage bonds.

In the case of *Union Trust Co. vs. Illinois Midland Co. (supra)*, the Court refused to refund money borrowed by the Receiver for the use and benefit of the road, on this ground (p. 476):

The Master had reported :

"But there appears to have been no express "authority from the Court to borrow these moneys. "While a Receiver entrusted with the operation of "a railroad must be allowed a certain discretion as "to outlays of money made in good faith in the "ordinary course of business, and to a certain ex- "tent the details of the business can be left to his "discretion, yet transactions of such magnitude "as the loans in this case are unwarrantable with- "out the previous authority of the Court, and the "conduct of the Receiver in this respect ought "not to be sanctioned, and certainly cannot be "permitted to become a precedent.

"At the same time the evidence seems to show "that the sums so borrowed were applied to pay "the expenses of the Receivership—repairs, sup- "plies, payrolls—or to replace moneys which had "been so applied. Mr. Genis' testimony is very "specific on these points. He says that after ap- "plying the income of the road towards expenses "—repairs, supplies, payrolls—and when he could "no longer postpone payment of balance he had to "borrow. While reprehending this unauthorized "action, yet as the money was applied to repairs "of the property and expenses of administering "the trust, and as the transaction was thus bene- "ficial to the parties in interest, and as no bad "faith appears to be imputed to the lenders, it "seems to me that the rejection of these claims as "against the lenders would be harsh and inequit- "able.

* * * * * *

But this Court said :

> "By the final decree the items of $54,900 and "$32,000 are declared to be subordinate to the "mortgage bonds while allowed as indebtedness "contracted by the Receiver. We are of opinion "that these two claims ought not to be allowed "priority. The debts were contracted without the "previous authority of the Court; the amounts "were large, and we cannot sanction the action of "the Receiver in borrowing sums of money so "large in amount without the previous authority "of the Court, even though the purposes to which "the moneys were applied were such as is shown."

In the cases at bar, the transaction was of far greater magnitude, involving, as the final decrees show, $218,462.65, exclusive of interest. There was no express authority from the Court to use these cars; there was no contract for their use made by the Receiver, either with or without authority of Court; and until the first mortgage bondholders filed their petition asking the Court to compel the equipment owners to remove their property, there was no intimation to the Court by the equipment owners or the Receiver that a charge for the use of the equipment was contemplated. The contention of the owners, up to that time, was, that the Court should carry out the contracts and purchase the equipment.

Moreover, in the cases at bar it appears that the use of the equipment did not contribute to the *payment* of expenses of the Receivership, but contributed to the *creation* of the expenses.

So it may be said here, in accordance with the

principle announced by this Court in the above case, that debts for large sums for the use of rolling stock, used by the Receiver without authority from the Court, are not to be allowed priority over first mortgage bonds, because there never could be any difficulty in obtaining an order of the Court, if one were proper, to rent or use rolling stock to a specified extent for specific purposes.

In the case of *Union Trust Co. vs. Illinois Midland Co.* (*supra*), it is further held (p. 436):

> " Rents due for use of rolling stock and money
> " due for extraordinary depreciation of rolling
> " stock * * * were not allowed priority in
> " this case."

Upon this point Mr. Justice BLATCHFORD says (p. 479):

> " Waring Brothers also object because the final
> " decree orders that the rents due Waring Broth-
> " ers for use of rolling stock, * * * and the
> " sum of $21,099.43 due Waring Brothers for ex-
> " traordinary depreciation of rolling stock be sub-
> " ordinated to the mortgage bonds of the three
> " sectional roads respectively. The net amount
> " due for the above rents, as stated in those sched-
> " ules, with interest to January 15, 1885, is $325,-
> " 354.35, and that amount is allowed as a debt by
> " the Commissioner. *The Court did not allow it*
> " *priority, and we see no sufficient ground for revers-*
> " *ing the decision.* The same conclusion is reached
> " as to the item for $21,099.13."

The report of the case of *Union Trust Co. vs. Illinois Midland Co.*, as found in 117 U. S., does not fully disclose the circumstances under which the rolling stock was furnished by Waring Brothers to the Receiver. Those facts are of great importance, however, in determining the application of the principles of that case to the cases at bar. From an examination of the record on file in this Court, in that case, it will be found that the equities of Waring Brothers were very much stronger than the equities of the equipment owners in these cases.

It will be seen from the record in that case, that the first sale of rolling stock made by Waring Brothers to the Receiver was made after the Receiver had filed his petition asking leave of the Court to enter into the contract, the Receiver under oath advising the Court that he needed, for immediate use, all the rolling stock so owned by Waring Brothers. The application was supported by the affidavit of the General Superintendent of the Receiver, who stated that the rolling stock was greatly needed to move the traffic of the railway; and by the affidavit of the master mechanic, who stated that the prices proposed to be paid were reasonable.

The Court thereupon expressly authorized the Receiver to make the contract of purchase with Waring Brothers.

Subsequently the Receiver again presented a petition to the Court, asking leave to purchase additional cars from Waring Brothers. The cars had formerly been sold by a car company to the Receiver; default having been made in the conditions of sale, Waring Brothers purchased the cars from the car company, and

the Receiver advised the Court that he could buy the same cars upon more favorable terms from Waring Brothers. The application was supported by a statement made by the Receiver's general superintendent, who advised the Court that the proposed contract was a good contract for the Receiver, was at a fair price and ought to be entered into for the interests of all concerned. The master mechanic substantiated these statements.

These contracts were for rolling stock which had previously been used by the Receiver, but which had been taken from him because of forfeiture of the conditions of the lease, and were re-sold to the Receiver by Waring Brothers at more reasonable terms for the Receiver. The petition was granted.

Subsequently Waring Brothers, by express contract, sold and leased to the Receiver additional rolling stock, some of which was manufactured expressly for the purpose of being sold to the Receiver.

Still later the Receiver petitioned the Court for leave to purchase of Waring Brothers 200 additional box cars, representing to the Court that the rolling stock under the control of the Receiver was insufficient to meet the demands of traffic; that he was unable to fill more than one-half the daily requisitions for cars; that not more than one-third of the demands for equipment could be met from his then supply of rolling stock, and that the Receiver required immediately at least 200 box cars which he could not lease except at rentals which would in about thirty-six months amount to the price of the cars; and he, therefore, asked authority to purchase the same from Waring brothers. The petition was granted. It was supported by evidence as

to the reasonableness of the price of the cars, and by evidence of the traffic manager of the Receiver, showing the necessity for the purchase and the benefit to be derived from their use.

The Receiver being unable to pay the rentals for the leased rolling stock, and the purchase price of the rolling stock purchased, Waring Brothers filed their petition for the reclamation of the rolling stock, and for an adjustment of rentals on the basis of their contracts. The Court ordered the return of the property and appointed a Commissioner to state the account.

Waring Brothers then leased to the Receiver, under authority from the Court, the rolling stock so reclaimed, at rentals less than those reserved in the original contracts.

Subsequently, Waring Brothers filed a petition, asking return of the 200 cars sold the Receiver which had not been paid for. The Receiver resisted the return of the cars, and filed an answer to Waring Brothers' petition. The cars were not returned by the Court for more than two years after the petition was filed. The Receiver, in the meantime, had used the cars and had received the mileage which they had earned on foreign roads.

By reason of its use, the rolling stock owned by Waring Brothers had depreciated in value, and a large portion of it was practically worn out.

[These facts will be found in the original record in *Union Trust Co. vs. Illinois Midland Co.*, Nos. 1212, 1213, 1214 and 1225, October Term, 1885, on file in this Court, Vol. 1, pp 102, 106, 115, 116, 136, 377, 388, 389, 446, 451, 504, 556.]

Under these circumstances, the Circuit Court held

that, although a debt against the Receiver, the claim of Waring Brothers for depreciation and rental of rolling stock was not entitled to priority over the claims of first mortgage bond holders; and this Court said, "We see no sufficient ground for reversing the decision."

If, under such circumstances, a claim for rental and depreciation of rolling stock was not entitled to priority ont of the proceeds of sale as against first mortgage bonds, upon what principle of equity jurisprudence can it be claimed that appellees in the cases at bar are entitled to such preference?

In that case no rolling stock was sold or rented by Waring Brothers to the Receiver, except upon express contracts made with the Receiver, who had the prior authority of the Court for his action. No such contracts were authorized by the Court, except upon prior showing that the terms of the contract were reasonable, that the use of the equipment was necessary for the operation of the road by the Receiver, and that its use would be for the benefit of all parties interested in the property, and would contribute to increase the earnings and thereby enhance the value of the mortgage estate. The claim for compensation upon *quantum meruit* was based upon the failure to return equipment after its reclamation had been demanded under the terms of the contract of lease.

No such facts were shown, or existed, in the cases at bar. No contract for rental was made by the Receiver; or, if made, no such contract was authorized. Even the use of the equipment by the Receiver was not authorized by the Court. It was not shown, neither could it have been, that the use of the equipment was necessary to

the operation of the road. On the contrary, it appears that the railroad had equipment sufficient for the purposes of economical operation. It was not shown that the use of the equipment contributed anything to the value of the mortgage estate.

The rentals claimed were not reasonable, and, as is hereafter shown, were more than four times greater than the price at which similar rolling stock could have been obtained upon the usual mileage basis. Appellees, in the cases at bar, never claimed, until after the Court refused to recognize the contracts of conditional sale made with the Railroad Company, and ordered the return of the cars, that they were entitled to compensation for their use.

No fact material to the protection of the bondholders in the case of *Union Trust Co. vs. Illinois Midland Co.* is wanting in the case at bar; and none of the material facts upon which counsel for Waring Brothers relied in the Midland case is to be found in these cases.

Appellant Kneeland therefore earnestly contends that, in accordance with the principles clearly established in the case of *Union Trust Co. vs. Illinois Midland Co.*, the decrees in favor of appellees should be reversed; and that, upon the authority even of that case alone, no priority should be awarded to claims for the rental of cars by the Receiver in preference to the secured claims of first mortgage bondholders.

The fund arising from the sale of the mortgaged property belongs to the bondholders. Whoever asserts a prior lien, arisng out of subsequent transactions, must overcome the presumption which arises in favor of

mortgage creditors, and must present facts which bring him within recognized principles of equitable priority.

It is not disputed that there are circumstances under which the liens of prior mortgages and the rights of prior mortgage creditors may be subordinated to subsequent equitable claims. Not only is this true of the income of a receivership of railroad property, but it may be extended, also, in certain well-recognized cases, to the proceeds of the sale of the mortgaged property. This Court, speaking by Mr. Chief-Justice WAITE, upon that subject said, in the case of *Fosdick vs. Schall*, 99 U. S., 254:

> "Thus it often happens that in the course of the "administration of the cause the Court is called "upon to take income which would otherwise be "applied to the payment of old debts for current "expenses and use it to make permanent improve- "ments on the fixed property or to buy additional "equipment. In this way the value of the mort- "gaged property is not unfrequently materially in- "creased. * * * Under such circumstances it "is easy to see that there may sometimes be a "propriety in paying back to the income, from the "proceeds of sale, what is thus again diverted "from the current-debt fund in order to increase "the value of the property sold. The same may "sometimes be true in respect to expenditures be- "fore the receivership. No fixed and inflexible "rule can be laid down for the government of the "Courts in all cases. Each case will necessarily "have its peculiarities, which must, to greater or "less extent, influence the Chancellor when he "comes to act. *The power rests upon the fact that*

> " *in the administration of the affairs of the company*
> " *mortgage creditors have got possession of that which*
> " *belongs to the whole or a part of the general cred-*
> " *itors. Whatever is done, therefore, must be with a*
> " *view to a restoration, by the mortgage creditors, of*
> " *that which they have inequitably obtained. It*
> " *follows that if there has been in reality no diver-*
> " *sion there can be no restoration, and that the*
> " *amount of the restoration should be made to depend*
> " *upon the amount of the diversion.*"

The principles here announced have been often reasserted by this Court and applied to the varying circumstances of different cases. But, under no circumstances, has there been a departure from the principle then announced; that where there has been no diversion *to the benefit of the mortgaged property*, there can be no restoration from the mortgaged property, and that in any event the amount of the restoration must be made to depend upon the amount of the diversion.

This Court in reasserting this doctrine in late cases, said in *Burnham vs. Bowen*, 111 U. S., 776 :

> " That if current earnings are used for the bene-
> " fit of mortgage creditors before current expenses
> " are paid, the mortgage security is chargeable in
> " equity with the restoration of the fund which
> " has been thus improperly applied to their use."

And in *St. Louis, Alton and Terre Haute Railroad Company vs. Cleveland, Columbus and Indianapolis Railroad Company*, 125 U. S., 658, this Court, refer-

ring to this rule, and the former decisions of the Court thereon, said :

> " There has been no departure from this rule in
> " any of the cases cited, and it has been adhered to
> " and reaffirmed in them all."

In the still later case of *Wood vs. Guarantee Trust Company*, 128 U. S., 421, this Court again, in commenting upon the doctrine of *Fosdick vs. Schall*, said :

> " The doctrine announced in *Fosdick vs. Schall*
> " only applies where there has been a diversion of the
> " income of a going concern from the purposes to
> " which that income is equitably, primarily, de-
> " voted, viz., payment of the operating expenses of
> " the concern. In other words, that the income
> " must be first devoted to the expenses of produc-
> " ing the income."

It is difficult to see how appellees, by any possible construction of the facts of this case, or by any possible application of equitable considerations, can bring themselves within the principles essential to the establishment of the priority of their claims.

SECONDLY. *Are claims for the use of rolling stock, against a Receiver appointed upon the application of a creditor who who had neither lien nor security of any kind, entitled to priority over first mortgage bonds out of the corpus of the mortgage estate ?*

When an unsecured creditor applies for the appointment of a Receiver, he may acquire the right to be paid out of net earnings, but cannot in any way impair or lessen the lien of the first mortgage bonds.

When, in such a proceeding, a Receiver is appointed, he takes possession of the property for the purpose of using net earnings for the payment of such claim; and if there are no net earnings, the claim represented by him cannot be paid.

If the property is sold, then there must be paid out of the fund, such creditors as have a lien, or as had a lien, on the property the sale of which produced the fund; and these must be paid in the order of their priority. An unsecured creditor cannot create a lien, as against first mortgage bondholders, for the purpose of trying the experiment of whether net earnings can be realized to an extent sufficient to pay his claim. Experiments must be made at the expense of those who make them.

Dwight was appointed Receiver at the instance of an unsecured creditor; and if the property had been, by the order of Court, sold the next day, and had not brought enough to pay all bondholders, the unsecured creditor would have received nothing. Now, why should the Receiver of an unsecured creditor be permitted to operate the property at the expense of the bondholder? He takes possession under the plea that the property, properly managed, will not only pay prior liens, but will leave something for the benefit of the unsecured creditor; and it is this "something" that he represents. If, however, nothing is made—nothing is realized—then this "something" should not be taken from the bondholder for the purpose of fulfilling the prophecy of the unsecured creditor.

In this case, Dwight was appointed Receiver of the entire system and so remained for a period of four months. During that time he failed to receive an

amount equal to the operating expenses. Not only so —he failed to receive enough to pay the operating expenses—without counting rentals or taxes, without paying dues to connecting lines, and without repairs and renewals.

The first thing done was to authorize the issuance of a Receiver's certificate to pay for labor. Not including the items already mentioned, Mr. Dwight succeeded in adding to the debt about $119,000. Is it possible that, under these circumstances, the property of the bondholders can be taken, not only to pay that deficit, but for the rentals of cars used by the creditor's Receiver in the unsuccessful experiment.

This Receiver was appointed, first, because judgments were being obtained; and, second, because divisions might be sold.

The answer to this is, *first*, that judgments so obtained would not have priority over the claims of the bondholder; consequently, that was not a danger in which bondholders were interested. Secondly, the fact that the property might be sold and divided was not a danger, for the reason that that is exactly what happened under the decree of the Courts. So that the last mentioned danger was not avoided, because, as a matter of fact, it was to the interest of all parties that it should be divided. This is apparent from the fact that, as a system, it had always lost money.

There is another difficulty in this case, and that is this: Dwight, the Receiver under the creditor's bill, operated the entire property for about four months; and yet the rentals are calculated, not during the period

of four months, but from the 1st of August, 1883, to the 1st of August, 1884; and in the Master's report no distinction is made between the receivership of Dwight, and what might be called the receivership of the bondholders. So that it is impossible for the Court to say what amount is allowed for rentals, repairs and renewals during the unsecured creditor's receivership, and what amount is allowed during the bondholders' receivership.

There is also another difficulty. Dwight was appointed Receiver of the entire system. His successor was appointed, or took possession, on the 1st of December, 1883. Bills were filed by the trustee of the bondholders on the various divisions, and the receivership of Dwight—or the receivership established or created under the creditor's bill—was extended to all of the divisions, except to the division from Kokomo, Indiana, to East St. Louis, Illinois.

No order of the Court was ever made in the foreclosure suit, brought to foreclose the mortgage on the property from Kokomo, Indiana, to East St. Louis, Illinois, appointing any Receiver. No receivership was ever created, and no Receiver ever appointed, for the property in this division from Kokomo, Indiana, to East St. Louis, Illinois, except in the Braman suit, in which Dwight was appointed Receiver for an unsecured creditor.

As a matter of fact, no bill was filed by the trustee in the mortgage, to foreclose the division lying between Kokomo, Indiana, and East St. Louis, Illinois, until the 17th day of June, 1884; and no action was taken upon the filing of that bill, as to the appointment of

any Receiver, or as to the extending any receivership theretofore made over that division.

The Master in his report has made no distinction in these divisions or as to the various receiverships, but he has treated this division as though William J. Craig had been appointed Receiver under the bill of the trustee to foreclose that mortgage. So that now it is impossible for the Court to say what part or proportion of the rentals can or should be charged to that division or to the division between Toledo and Kokomo, for the reason that no calculation has been made taking into consideration the time that the division between Toledo and Kokomo was operated, first by Dwight and then by William J. Craig, or the time that the division between Kokomo and East St. Louis was operated by a Receiver under the Braman bill. That is to say, the Master has made no distinction between a Receiver appointed at the instance of the trustee of the first mortgage and a Receiver appointed in the Braman bill at the instance of an unsecured creditor.

It is true that in *Union Trust Co. vs. Illinois Midland Co.*, 117 U. S., 461, it was held that the fact that the trustees or bondholders did not initiate the suit, did not, under the particular circumstances of that case, prevent the Court from making the certificates a lien upon the *corpus* of the property prior to that of the first mortgage bonds.

But the certificates so issued and awarded priority were used for necessary repairs upon the mortgaged property, after a finding by the Court that the road was in great need of immediate repair, and in an unsafe condition to be operated, and that the particular part of

the line upon which the certificates were made a first charge required an immediate outlay to put it in safe condition.

Moreover, there were in that case broad grounds for the sequestration of the property by a court of equity, and the interests of all parties required that the Receiver should have, and he was granted, extensive powers for the management, control and operation of the property.

The Court found that the order so entered was entered in a cause conducted in reality for the benefit of the bondholders. And, as the money had been actually and faithfully applied under the order of the Court to the improvement of the mortgaged property, the Court held that there was no equitable reason why the bondholders should escape the burden while obtaining the benefits ; and especially as the objections then made to the order would have been unavailing if they had been made before the order was entered. Accordingly, the Court said (p. 460) :

> " If it appears that the Court did what ought to
> " have been done, even had the trustee and the
> " bondholders been before it when the certificates
> " were authorized to be issued, the property should
> " not be relieved from the charge made upon it in
> " good faith for its protection and preservation.
> " * * * Nor have the bondholders any ground
> " of complaint if the Court charges upon the prop-
> " erty such expenditures as now appear to have
> " rightfully made in the interest of all concerned
> " in its management while in the hands of a Re-
> " ceiver."

But certainly there must be a wide distinction between expenditures so authorized and made at the instance of stockholders and lienholders, whose interests were identical with, although inferior to, those of the bondholders, and indebtedness incurred at the instance of an unsecured creditor, who showed by his bill that that the property he asked to be seized was not worth sufficient to pay prior secured debts, and the operation of which had never, up to that time, yielded sufficient income to pay operating expenses.

THIRDLY. *Should the allowance for the use of rolling stock have been equitably made upon a mileage basis, representing the actual service of the equipment,—the extent to which the equipment by possibility contributed to the value of the mortgage estate,—or upon a basis of monthy rentals?*

Perhaps no more conclusive argument can be made upon this question than a showing of the comparative amount of such rentals.

The following statement prepared from the records will give some idea of the extent to which the allowances, as made, exceed the usual allowance, as between railroad companies, for the use of equipment.

COMPARISON OF RENTALS.

1. Under monthly rates fixed by Court:

196 box cars, 270 flat cars and 24 coal cars, in Series a, b, c and d, Boston Car Trust, rental August 1st, 1883; August 1st, 1884, and reported by

Master and approved by Court (Record No. 1537, p. 25)	$20,355.55
Allowance for repairs	1,532.67
Total	$21,888.22

2. *Upon actual service of cars* (mileage basis):

Same cars as above, August 1st, 1883; August 1st, 1884, at ½ cent per mile (Record No. 1537, pp. 133, 134)	$4,905.38

Showing that the cost of the same amount of equipment, upon the mileage basis, the owners furnishing cars in repair, would not exceed more than 25 per cent. of the rentals allowed by the Court.

It would seem as though from a bankrupt railroad, and a Receiver who was constantly losing money, the ordinary compensation paid between solvent Railroad Companies should be considered reasonable. This is particularly so in view of the fact that the owners of this equipment have realized upon the security which they themselves retained. They retained title in themselves, under the contracts of conditional sale, and thus reserved a prior lien upon all their property. They realized upon this security, and in so doing they certainly fared much better than the bondholders who were secured by mortgage upon the property whose value this rolling stock was used to depreciate.

The injustice of such an allowance on the monthly basis is further apparent when we consider the service performed by the cars. From the record in case No.

1537 and the tables following page 130, it will be seen that the coal cars averaged 6⅜ miles per day per car; the box cars averaged 9⅛ miles per day per car; and the flat cars averaged 2¼ miles per day per car, for the entire year from August 1st, 1883, to August 1st, 1884; or an average of all classes of cars of 5½ miles per car per day—which at the usual rate of one-half cent per car per mile would make the average rental less than 3 cents per day.

And for this use, for the period of a year, the equipment owners were allowed for rentals and repairs, for the cars included in that particular lease, $21,888.22.

When it is remembered that the amount allowed in these cases in favor of the equipment bondholders, $218,462.65, is but 46 per cent. of the gross rentals decreed in favor of appellees (the remainder, as appears from the reports of the Special Master, being charged upon the Divisions situated in the Southern District of Ohio); and when it is remembered that it is but for the period of seventeen months; and when it is remembered that the owners of the equipment have reclaimed their property; and when it is remembered that part of the purchase price upon this same equipment was paid by the Railroad Company, it seems that it would be no more than equitable to hold that the owners of equipment had already been fairly compensated, and, as against first mortgage bondholders, they should not be decreed to have in addition one-eighth of the entire proceeds of sale of the mortgage estate.

If it is claimed by counsel for appellees that the owners of the cars should at least be paid for the use

of the cars, then the trouble is that it has been established that the cars did not run, or were not hauled, to exceed between five and six miles per day. It is also shown that on a mileage or wheelage basis the owners of cars should not be paid to exceed half a cent per mile; and upon this basis the rental of the cars would be less than a dollar a month—that is to say about $10 a year.

The owners of these cars knew—and by law are held to have known—

FIRST. That there were mortgages upon this property superior to any claim they might have, to the extent of $19,000,000. All these were of record, and consequently were notice to the world.

SECOND. That they had received no rentals, and that the Railroad Company was not earning its expenses.

THIRD. That at the time of the appointment of the creditor's Receiver they were creditors to the amount of $2,000,000, with claims past due amounting to over $200,000.

FOURTH. The bill filed by Braman was notice to them; the appointment of a Receiver was notice to them, and they permitted their property to remain in the hands of a Receiver appointed in the suit of an unsecured creditor, without contract, and without any order by the Court, add without any understanding with the Receiver.

FIFTH. All the reports made to the Court and spread of record were notice to them; and from such reports they knew that the expenses of operating the road

largely exceeded the earnings. Consequently they were notified that the use of their cars resulted, not in earnings, but in loss. They could not say that their cars were being worn out by the railroad any more than the owners of the railroad could say that their road was being worn out by these cars.

It is also in evidence that far more cars were on the road than could be used, and this is established in two ways:

First. By the statement of the Receiver (Record No. 1537, p. 148) in a letter addressed to E. R. Chapman, who represented the lessors of cars, in which the Receiver says that, "There are no tracks on the main line "except our regular sidings, which are in constant use "for the transaction of business. If the cars were "brought upon this line they might become scattered, "and we would be compelled to move them around "from time to time, not having any tracks which we "could devote exclusively to the storage of cars."

From this it appears that the cars were simply an encumbrance and hindrance, by occupying side-tracks to the exclusion of business, and had to be moved from time to time simply to get out of the way of business. This is probably what was done, and accounts for the five miles and a half a day that they were moved.

Second. By the evidence showing that the cars were not run on the average to exceed five and a half miles per day.

These two facts conclusively show that there were far more cars upon the line than could possibly be

used. These facts were known to the owners of the cars. They knew what the business of the road was, what the earnings were, and what the expenses were—because all these things were of record in the very cases where they had filed their petitions, asking to have the contracts of purchase specifically performed.

Recapitulation.

Appellant Kneeland therefore contends that the decrees in favor of appellees are inequitable and erroneous, and should be reversed:

1. Because the fund arising from the sale of mortgaged property should first be devoted to the payment of the mortgage debt.

2. Because the use of the equipment was not in consequence of any contract made by any order of the Court; was not in consequence of any agreement made between the owners of the cars and the Receiver, or by virtue of any understanding, either with the Receiver or with the Court.

3. Because the use of the equipment was not necessary for the operation of the road by the Receiver.

4. Because the use of the equipment was not necessary for the preservation of the property.

5. Because the use of the equipment did not contribute to the value of the mortgaged estate—to the value of the property—but simply increased the loss with which the mortgaged property was burdened.

6. Because there was no diversion of earnings for any purpose and no net earnings made.

7. Because in any event the amount found due for rentals is excessive, inequitable and unjust, for the reason that the evidence shows that three cents per day would have paid for the mileage, but that it would have required several times that sum to have paid the loss on each car.

8. Because the appellees had notice of all the facts, of all the prior liens, and especially of the fact that their cars day by day increased the loss.

9. Because no distinction is made between the use of the cars by the Receiver appointed in the suit of an unsecured creditor and the use by the Receiver appointed in the foreclosure suits. Neither is the fact taken into consideration that no Receiver, so far as bondholders are concerned, was appointed on the Division from Kokomo, Indiana, to East St. Louis, Illinois.

10. Because the appellees never petitioned the Court to take any action during the time the cars were so used, except to ask that the original contract of purchase be enforced.

11. Because the said appellees failed to remove their property, or to assert their rights under their contracts of purchase, and, as a matter of fact, did not remove the property until the Court on application of the first mortgage bondholders compelled the appellees to remove their cars.

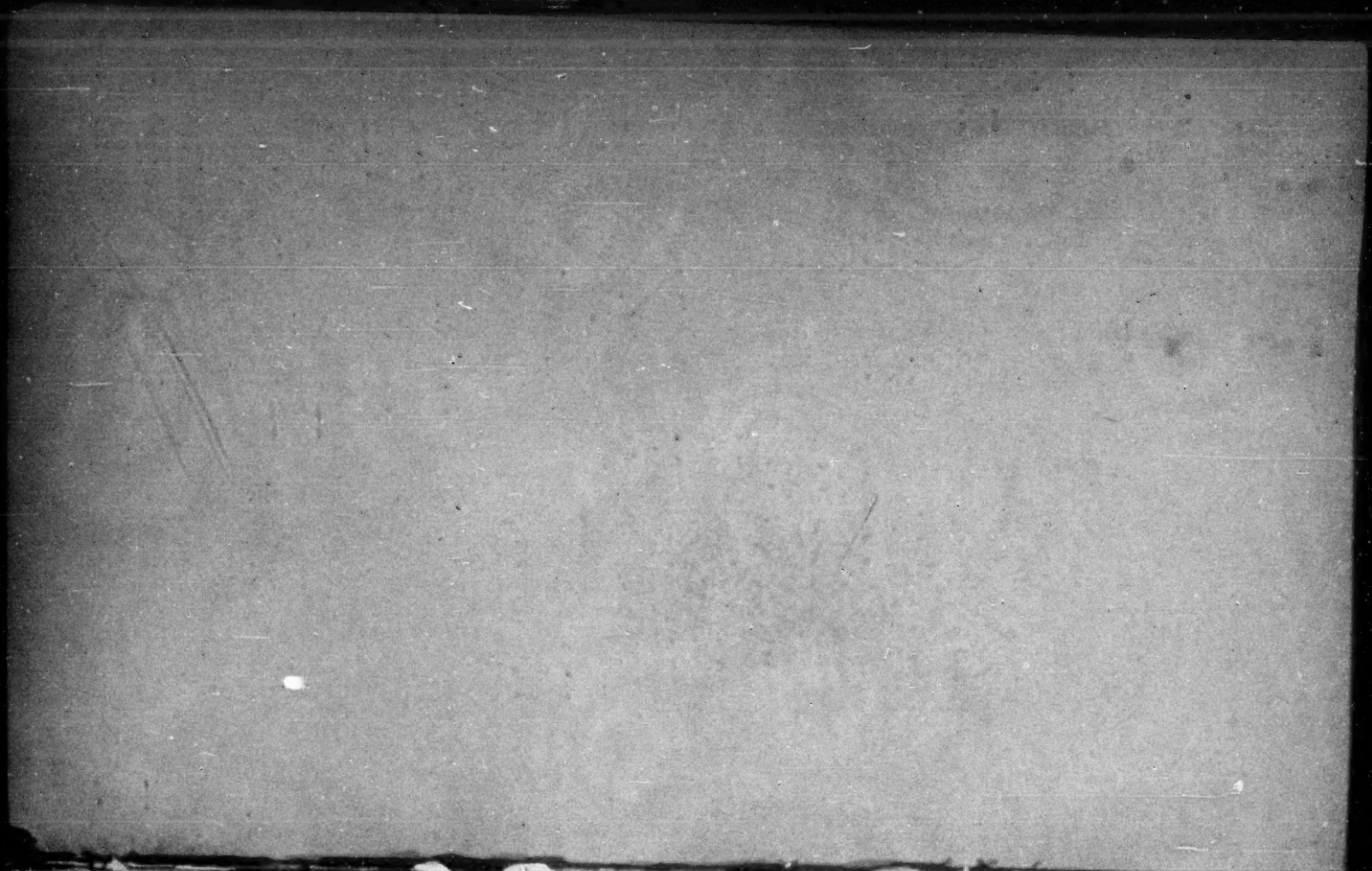
12. Because the appellees insisted that the original contract with the company should be enforced, and so insisted until compelled by the Court at the request of bondholders to remove their cars from the road.

13. Because the debt for car rentals, if a debt against the Receiver, was for a large sum and was incurred without authority of the Court and upon the authority of *Union Trust Co. vs. Illinois Midland Co.*, is not entitled to priority.

14. Because upon the express authority of *Union Trust Co. vs. Illinois Midland Co.* rents due for use of rolling stock by a Receiver are not entitled to priority over first mortgage bonds, where there has been no diversion of earnings for the benefit of the mortgage estate.

March, 1890.

ROBERT G. INGERSOLL and
CLARENCE BROWN
For Appellant.



SUPREME COURT
OF THE
UNITED STATES.

SYLVESTER H. KNEELAND,
Appellant,
vs.
THE AMERICAN LOAN AND TRUST COMPANY OF BOSTON, THE GRANT LOCOMOTIVE WORKS, D. S. PAUL, TRUSTEE, ET AL.,

No. 252.
OCTOBER TERM, 1889.

AND

SYLVESTER H. KNEELAND,
Appellant,
vs.
GEORGE WILLIAM BALLOU, TRUSTEE.

No. 1537.
OCTOBER TERM, 1889.

Appeals from the Circuit Court of the United States for the District of Indiana.

REPLY BRIEF IN BEHALF OF APPELLANT.

On March 26, 1890, copies of the briefs of Mr. James L. High, of counsel for appellees, were received by me. Some of the statements made, and positions assumed, by counsel are so extraordinary as to warrant a brief reply.

I.

The first position assumed by Mr. High in his brief is, that appellant Kneeland is not entitled to appeal.

At page 23 he says: "Sylvester H. Kneeland has no appealable interest in the matters here in controversy. He appears for the first time in the litigation as the purchaser of the two divisions of the road under the foreclosure sales. That he purchased in his individual capacity, and not as a bondholder of either division, or as a trustee or committee for the bondholders, is apparent from the reports of the masters making the sale." Again at pages 85 and 86 he says: "The undersigned has been concerned in this litigation from the beginning; he has grown old and gray in endeavoring to secure to his clients the modest allowance of rental finally awarded by the Circuit Court. He had supposed himself to be familiar with the entire record, but he is now advised for the first time, by a mere statement of counsel for appellant, that Kneeland purchased as a trustee for the bondholders, pursuant to an alleged agreement to that effect. The record may be searched in vain for any hint or suggestion of this pretended agreement under which it is alleged that Kneeland purchased as a trustee and representative of the bondholders."

These are quite remarkable statements to be made by one "concerned in this litigation from the beginning," and who "has grown old and gray" in the service of these appellees.

It is true that the contract between Kneeland and the Bondholders' Committees, of which Quigley was chairman, by which Kneeland became trustee for, and representative of, substantially all of the main line bondholders, does not appear in this record. The design in

making up this record was only to include in its papers absolutely necessary to the presentation of the real questions involved. Hence, not more, perhaps, than one-tenth of the record is brought here. But, if Mr. High were "familiar with the entire record" and knew all that transpired in the litigation, he would know that the contract by which Kneeland became trustee for, and representative of, the main line bondholders, was submitted to the Court at the final hearing at which foreclosure decrees were entered, and that an important provision was inserted in said foreclosure decrees on account of the fact, then and there proved to the entire satisfaction of the Court, that Sylvester H. Kneeland, under and by virtue of his contract with the Bondholders Committees, did become, and was, trustee for and representative of substantially all of the main line bondholdholders, he himself being also a bondholder in his own right. The writer of this brief personally drafted the foreclosure decree foreclosing the mortgage on the main line from Toledo, Ohio, to Kokomo, Indiana, and, in connection with Mr. Abram W. Hendricks, also drafted the decree foreclosing the mortgage on the main line from Kokomo, Indiana, to East St. Louis, Illinois. At the final hearing resulting in those foreclosure decrees, the writer of this brief personally submitted to the Court Kneeland's contract in justification of the following clauses in the two decrees, namely: "The complainants herein, and the purchaser or purchasers at the foreclosure sale under this decree, reserve the right to appeal from any orders and final decrees made by the Court directing and decreeing the payment of claims and debts found and determined and adjudged and decreed to be due and payable as Court and receiver's in-

debtedness, and to be prior and superior in equity to the lien of said first deed of trust and mortgage herein and hereby foreclosed."

(Rec. in Cause No. 252, p. 470.)

"Leave is hereby reserved to said trustees, and to the purchaser or purchasers at the foreclosure sale under this decree, to appeal from any order or final decree made by the Court directing the payment of claims as prior and paramount to said mortgage bonds and coupons."

(Rec. in Cause No. 252, p. 481.)

These decrees expressly give the right to pay in bonds and coupons all that part of the purchase money not required for payment of claims decreed to be paramount in lien to mortgage bonds. In the Toledo Division decree this provision reads as follows: "In making payment of any surplus of said purchase money left after full payment of the Court and receiver's indebtedness, the purchaser or purchasers shall be allowed to pay said surplus in the bonds and coupons to which the same may be applicable, as herein above provided, each such coupon and bond being received by the master for such sum as the holder thereof is entitled to receive under the distribution herein provided and according to the priorities herein adjudged."

(Rec. in Cause No. 252, p. 469.)

In the St. Louis Division decree this provision is in the following words: "In making payment of any surplus of purchase money that may be left after full payment of costs, allowances, and Court and receiver's indebtedness, the purchaser or purchasers shall have the privilege of paying such surplus with the interest coupons and bonds to which the same may be applicable,

as herein above provided, at such price as the holder thereof would be entitled to receive in cash if the entire purchase money were paid in cash."

(Rec. in Cause No. 252 p. 480.)

That the Bondholders Committees had full power and authority to enter into the contract with Kneeland above referred to,—and which was submitted to the court at the final hearing on the foreclosure of the mortgages on the main line,—is evidenced by a paper that happens to be in the record, as made up. This paper is the contract between the main line bondholders and the Bondholders Committees, of which James M. Quigley was chairman.

(Rec. in Cause No. 252, pp. 272 to 282.)

The exceptions to the report of Master Fishback touching car rental, and the decrees here appealed from, prove conclusively that the Circuit Court fully recognized Kneeland as trustee for and representative of the main line bondholders.

In the exceptions to the Master's final report it is stated that "Sylvester H. Kneeland, purchaser of said railroad and property sold at foreclosure sale under decrees rendered and entered in said above entitled causes and owner of, and trustee for, a vast majority of said mortgage bonds" excepts, &c.

(Rec. in Cause No. 252 p. 552.)

The decree appealed from contains the following clear statement of the Court recognizing Kneeland as trustee for and representative of the main line bondholders: "To which decree the said Sylvester H. Kneeland, as purchaser and trustee representing the first mortgage bondholders on said entire line of railroad, concerning both divisions from Toledo, Ohio, to

East St. Louis, Illinois, now excepts and prays an appeal to the Supreme Court of the United States, which is granted to operate as a *supersedeas* on giving bond in the sum of $200,000, which is now filed with the American Surety Company of New York as surety, and the same is approved by the Court, the Court, however, reserving the right to resume possession of the property on the terms mentioned in the order confirming the sale and approving the deed."

(Rec. in Cause No. 252 p. 572.)

In the decree confirming the foreclosure sales we find the Circuit Court recognizing James M. Quigley, who was, as has been shown, chairman of both Bondholders Committees, as *agent* of Kneeland to receive possession of the road.

(Rec. in Cause No. 252, p. 555.)

In cause No. 1537 the Court again, both in the exceptions to the master's report and in the final decree, recognizes Kneeland as trustee for and representative of the main line bondholders, and as himself also a bondholder.

In the exceptions the following appears: "Now comes Sylvester H. Kneeland, purchaser of the railroad, property, rights and franchises sold at foreclosure sale under decrees rendered in the above entitled causes, and owner of and trustee for a vast majority of the bonds secured by the mortgages foreclosed in the above causes, and now, by leave of Court for that purpose first obtained, files his exceptions to said report and excepts to each and every of the Master's findings and report herein, and for exceptions assigns the following causes."

(Rec. in Cause No. 1537, p. 30.)

In the decree appealed from the following appears:

"From which decree the said Sylvester H. Kneeland, as such purchaser and bondholder, prays an appeal to the Supreme Court of the United States, which is granted to operate as a supersedeas, upon giving bond, with surety, to be approved by the Court, in the sum of twelve thousand dollars ($12,000) for the use and benefit of said George William Ballou, trustee, and in the sum of two thousand dollars ($2,000) for the use and benefit of the said Railroad Equipment Company."

(Rec. in Cause No. 1537, p. 35.)

These parts of the record are styled "recitals" and "foot notes" by the learned counsel for the appellees. Whatever they may be called, they most certainly are clear and explicit recognitions and statements of the Circuit Court that Kneeland did not stand as a stranger purchasing at the foreclosure sales, but that in addition to his being purchaser, he was also the trustee for and representative of the main line bondholders, and as such had the full right given to him by the Circuit Court, to contest the claims that were given preference over first mortgage bonds, and to appeal from decrees giving to claims priority of lien over first mortgage bonds.

At page 28 of his brief Mr. High admits that the Bondholders Committees had the right to appeal from these decrees, and cites the decision of this Court in *Williams* v. *Morgan*, 111 U. S., 684, in support of his admission. After the contract between Kneeland and the Bondholders Committees was made, Kneeland took the place of these Bondholders Committees in the litigation, and in their stead represented all of the main line bondholders who came into the reorganization arrangement, and signed the reorganization agreement. Up to the date of the foreclosure sales the Bondholders

Committees acted for themselves in behalf of the main line bondholders. After they made their contract with Kneeland, and after Kneeland under that contract purchased the main line at the foreclosure sales, the Bondholders Committees and the Court recognized Kneeland as trustee for and representative of all the main line bondholders joining in the reorganization scheme, including the Bondholders Committees.

It must be remembered that the foreclosure decrees were rendered November 12, 1885, (Rec. in Cause No. 252, pp. 461, 470), while the decrees here appealed from were rendered long afterwards, to-wit: April 5, 1886, and November 9, 1889.

(Rec. in Cause No. 252, p. 70.)
(Rec. in Cause No. 1537, p. 33.)

Hence it was entirely proper for Kneeland as purchaser, and as trustee for and representative of the main line bondholders including the Bondholders Committees, to take an active, leading part in all litigation with reference to claims for equipment rental and other receivership indebtedness, prosecuted subsequent to his purchase of the road at the foreclosure sales. Because under his contract and trust it was his duty to protect the purchase money fund for the bondholders whom he represented as trustee under the contract. The Circuit Court recognized this right and duty of Kneeland, and without hesitation permitted him after his purchase, and after he had exhibited to the Court his contract making him trustee, to file exceptions and take appeals in all cases in which claims were decreed priority over first mortgage bonds.

The learned counsel for appellees seems to have in some unaccountable manner reached the conclusion that

the foreclosure sales of the main line were made *subject to such claims and receivership indebtedness* as might thereafter be decreed to have, in equity, preference in payment over first mortgage bonds. At page 29 of his brief he says: "It is confidently submitted that a purchaser at a foreclosure sale, who buys subject to liens or priorities which have been, or may thereafter be established against the property sold, or who by the terms of the foreclosure decree, which is the origin and source of his title, covenants to pay all such claims, cannot be heard to question their validity by appeal or otherwise. Kneeland was such a purchaser."

This is an entire and utter misunderstanding of these foreclosure decrees. No such provision can be found in either of them. The Court by the decrees fixed *a minimum price* for each division, and required the Master to reject all bids under that minimum price. The bondholders through Kneeland as their representative did not buy at this minimum price and agree to pay, *in addition* to the minimum price fixed by the Court, all claims decreed to have preference over mortgage bonds. *The sales were not subject to these claims at all.* Kneeland as purchaser, under his contract with the Bondholders Committees and as trustee for the main line bondholders, bid for the entire line from Toledo, Ohio, to East St. Louis, Illinois $1,501,000.00.

(Rec. in Cause 252, pp. 514, 519.)

This sum is the utmost Kneeland could under the decrees, and the reports of sale, ever be required to pay. He did not buy at this price *subject to any claim whatever*, but he bought at this price *free from all claims.* Mr. High's mistake probably arises from the fact that by the decree the purchaser was required to pay into Court

from time to time such part of the price bid as the Court might order. He did not have to pay in all the money bid at once, but received possession subject to the right of the Court to retake and resell the property if he defaulted in payment of such portion of the price bid as the Court might require him to pay into Court for application to claims preferred to the mortgage bonds.

If the preferred claims amounted to $3,000,000 Kneeland could not be required to pay for the property a cent more than the $1,501,000 bid by him. The very fact that the Court fixed a *minimum price* and required the property to bring that price, negatives the idea that the sale was subject to any claims. Not one word even hinting at a sale *subject to claims* can be found in either decree.

The eleventh, twelfth, thirteenth and fourteenth sections of the Toledo Division decree definitely settle this question against Mr. High's statement.

(Rec. in Canse No. 252, pp. 467, 468, 469.)

The St. Louis Division decree as definitely settles the same question against Mr. High's statement.

(Rec. in Cause No. 252, pp. 479, 480.)

In the Toledo division decree, fourteenth section, it is provided: "The residue of the purchase money not required to make the payments required by and provided for in the above twelfth section of this decree, shall be paid by the purchaser or purchasers from time to time upon the amounts found and determined and finally adjudged and decreed by the Court to be due and payable upon Court and receiver's indebtedness, and to be prior and superior to the lien of said first deed of trust and mortgage, said payments to be made by the purchaser or purchasers upon twenty days notice by the

Masters, upon the order of the Court to that effect entered requiring such payment, *until the entire purchase money is exhausted*, if it requires the entire purchase money to pay and discharge said Court and receiver's indebtedness."

In the St. Louis division decree it is provided: "The residue of the purchase money not required to make the payments herein above required to be made prior to the delivery of possession, shall be paid by the purchaser or purchasers from time to time as paramount claims against the fund may be finally ascertained by decree of the Court, such payments to be made upon twenty days notice by the Master, pursuant to the order of the Court to that effect entered, requiring such payment, *until the entire purchase money shall have been paid.*"

These quotations from the decrees, taken in connection with the previous sections of the decrees above cited most clearly and definitely demonstrate that the sales, under these decrees *were not subject to any claims whatever.* All that could be required of the purchaser was and is to pay the amount bid and no more. This statement and proof adduced from the record disposes entirely of the position assumed by Mr. High that Kneeland has no right to appeal. The case of *Swann* v. *Wright's Executor*, 110 U, S., 590, cited by Mr. High in support of his mistaken proposition, is utterly without point in this case as is shown by the first lines quoted from the opinion of Mr. Justice Harlan, as found on page 31 of Mr. High's brief. The words are: "The claim of appellant, as the purchaser of the property, to reopen the litigation, to which he was not a party, *and which relates to liens expressly subject to which the property was sold, purchased and conveyed,*" etc. This single part

of a sentence shows conclusively that the decision in that case cannot by any possibility be in point in this case, because in that case the sale was expressly subject to certain liens and claims. While in the case now at bar, the sales were not subject to any claims. Neither is the case of *Stuart* v. *Gay*, 127 U. S., 518, in point here. It has been already abundantly shown that the Court repeatedly in orders and decrees recognized Kneeland as, not only a bondholder in his own right, but also as the trustee and representative of the main line bondholders. It is also equally certain that every claim which the Circuit Court decreed to have preference over the first mortgage bonds, if paid out of the purchase money, would just to that extent reduce and lower the *pro rata* distribution of purchase money to the bondholders. It was, therefore, not only the right, but the duty of Kneeland, as representative of the first mortgage bondholders, to resist to the uttermost the payment out of the purchase money fund of these claims to which preference in payment was decreed by the Circuit Court; because every claim that Kneeland could defeat would leave that much more of the purchase money for *pro rata* distribution to the bondholders. In *Stuart* v. *Gay*, *supra*, Stuart had no such interest in defeating claims decreed to have priority over mortgage bonds, and the Court very properly held that he had no appealable interest in resisting the payment of such claims and liens.

Here again, on page 34 of his brief, Mr. High makes a statement that seems incomprehensible in view of the plain language of the decrees. He says: "Stuart actually became the purchaser of a large number of the liens awarded priority, and thus became entitled to use such liens in payment of deferred installments of pur-

chase money, just as Kneeland, by the decrees in this case, was authorized to use first mortgage bonds." How Mr. High came to such a conclusion is quite remarkable. Under the decrees, the sections of which have been above cited, Kneeland had no right whatever to use any first mortgage bonds in payment of any part of the purchase price bid by him so long as any claims decreed to have priority over first mortgage bonds remained unpaid. The language of the decrees is conclusive upon this point.

The Toledo Division decree provides: "If any surplus is left after full payment of the Court and receiver's indebtedness, as herein above provided, the same shall be distributed *pro rata* upon the coupons and bonds of said first mortgage or deed of trust until the same are fully paid. * * * In making payment of any order and decree decreeing any specific sum to be due and payable upon any claim or debt adjudged and decreed due and payable as a part of the Court and receiver's indebtedness against said property, the purchaser or purchasers shall have the right to pay and discharge said decree by furnishing to the Masters the evidence that such purchaser or purchasers is the owner of the claim or debt so decreed to be due and payable, and has the authority to enter the same satisfied and discharged."

(Rec. in Cause No. 252, p. 469.)

In the St. Louis Division decree it is provided: "If any surplus of the purchase money shall remain after full payment of the Court and receiver's indebtedness, the same shall be distributed *pro rata* upon the coupons and bonds secured by the indenture of trust and mortgage hereby foreclosed."

(Rec. in Cause No. 252, p. 480.)

The detached portions of the Toledo Division decree, quoted by the learned counsel on page 30 of his brief, do not support the proposition in support of which they are cited, but when taken in their proper connection prove conclusively the exact opposite of the proposition.

Mr. High's entire proposition and the argument in its support fail utterly upon the discovery that these foreclosure sales were not made *subject to liens* against the property sold. The property was sold free of liens. All liens were transferred to the purchase money fund. Kneeland as representative of main line bondholders has the right to protect that fund for *pro rata* distribution to the bondholders. He therefore has the right to appeal from decrees giving claims preference over mortgage bonds. So the Circuit Court held, and in all exceptions, orders and decrees beginning with the foreclosure decrees, plainly recognized his right to appeal. If there were anything in this first proposition of Mr. High, it would be a proper cause for dismissal of the appeal on motion. Why is it then that Mr. High has been suffering himself to "grow old and gray" in waiting, rather than to have presented his motion to dismiss the appeal, raising this and other technical points of practice, presented by him now, three years later in his brief.

II.

The second proposition of Mr. High is that no question is presented to this Court by these appeals, because no objections to the Master's report were taken before the Masters. At page 35 of his brief he says: "The correctness of each of those reports was challenged for the first time by exceptions filed after the re-

ports were returned into Court. The rule is well established that exceptions to a Master's report cannot be entertained when the parties excepting have failed to present their exceptions to the Master before his report is returned into Court, in order that he may correct any errors to which his attention is thus called." The authorities cited in support of this proposition are musty with age and are based upon English practice under which no argument was made before the master. The master took the evidence, made up his accounting and report, and served notice on the parties or their counsel that he was ready to report. The parties or their counsel could then examine the draft of the report and make such suggestions and objections to its form and to the findings as were deemed proper, in order that the master might have opportunity to correct any errors in computation or mistakes in matters of law. Such is not the practice in this country, at least not in the seventh Circuit and adjoining Circuits.

In a somewhat busy practice in the Federal Courts of Indiana, Ohio, Illinois, Wisconsin, Missouri and Iowa during the last twenty-five years, I have never yet, in any single case, had a Master submit his first draft of report to counsel for objections and suggestions. The reason of this apparent change of the old and musty rule cited by Mr. High is, that in these latter days the Masters almost, if not quite, universally hear full argument on both sides before they make up any report. The uniform practice is for the Master to be attended by the parties and their counsel in the taking of testimony, oftentimes lengthy and close arguments being made before the Master as to the introduction of evidence. When the evidence is completed, the practice is

for counsel for both parties to make full presentation and argument of their respective sides of the case before the Master. The Master then makes up and files his report without giving any notice whatever to the counsel or the parties.

If the rule as laid down by Mr. High under these old authorities was now strictly in force, there is not an appeal pending from the District of Indiana surely, and I think not from any of the other States above named, which could not be disposed or on mere motion to dismiss, for the cause assigned by Mr. High. But the Masters in these appeals listened to full and repeated arguments before they filed any of their reports. Master Cox filed his original report in the Court at Cincinnati, and sometime after that merely sent a copy of his report to the Court at Indianapolis without giving any counsel interested in the cause, and there were many, any notice whatever that he was going to file his report. It has always been the universal practice of Master Fishback to hear argument before he makes up his reports and then make up and file his report without any notice whatever to the parties or their counsel. Such was his course in these appeals.

That Mr. High's proposition is, at all events, not the rule of practice in the District of Indiana, is conclusively shown by the decision of the Court in *Hatch* v. *Indianapolis and Springfield Railroad Company*, 9 Fed, Rep., 856 to 860.

This case presents the only instance of an attempt upon the part of any attorney to raise this question in the Federal Court of Indiana within my knowledge. Mr. High has in his brief presented the same question for the second time it has been presented with reference

to any case in the Federal Courts of Indiana within thirty years, to say the least.

In the case of *Hatch* v. *Indianapolis and Springfield Rrilroad Company, supra*, Judge Gresham said: "After the case was put at issue it was referred to the Master to take and report the testimony and a finding thereon. Both parties appeared before the Master and took testimony, without objecting to the terms of the reference. Having heard the arguments of counsel on both sides, the Master prepared his report and filed it in the Clerk's office on the twenty-fourth day of August, 1880. This was done without notice to either party that the report was ready to be filed. * * * It is urged by the complainant's counsel that, after writing out his report, and before filing it in the Clerk's office, the Master should have notified counsel that it was in draft, thereby affording them opportunity to point out supposed errors, and make objections to his conclusions, so as to give him an opportunity of considering and correcting his report, and that no exceptions, according to correct chancery practice, can be heard by the Court which have not been carried in before the Master. * * * In *Story* v. *Livingston*, 13 Pet. 359, the Court say: 'Strictly, in chancery practice, though it is different in some of our States, no exceptions to a Master's report can be made which were not taken before the Master; the object being to save time and to give him an opportunity to correct his error or to reconsider his opinion. Dick., 103. A party neglecting to bring in objections cannot afterwards except to the report, (Harr. Ch. 479.) unless the Court, on motion, see reason to be dissatisfied with the report, and refer it to the Master to review his report, with liberty to the party to take objection to it.

1 Dick., 290; Madd. Rep., 349, 555. But, without restricting exceptions to this course, we must observe that exceptions to a report of a Master must state, article by article, those parts of the report which are intended to be excepted to.' While the practice contended for by the complainant is here referred to as correct, according to strict rule, the Court declined to enforce it against the excepting party. * * * This case was argued at great length before the Master, and he, no doubt, comprehended the exact points in controversy. If the complainants motion should be sustained, his counsel would probably go before the Master, and, in support of objections to the draft, again repeat the arguments that he urged in the first instance.

"It is not the practice in this district, nor, as I understand, in this circuit, for the master, after hearing full argument, to prepare a draft of his report and then notify the parties and summon them to make objections. When the case has been fully argued in the first instance the legal right of the unsuccessful party to go before the master, make objections to the draft of the report, and argue those objections, is not recognized in practice. The equity rules provide for conducting references before masters in a simple and expeditious manner. It is fair to assume that in adopting these rules the Supreme Court meant to dispense with the old formalities incident to settling the Master's report. Rule 77 provides that the—

"'Master shall regulate all the proceedings in every hearing before him, upon every such reference' * * * 'and the Master,' says Rule 83, 'as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in

the order book. The parties shall have one month from the filing of the report to file exceptions thereto; and if no exceptions within that period are filed by either party, the report shall stand confirmed the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session; or, if not, at the next sitting of the Court which shall be held thereafter.'

"Nothing is said here, or in any of the other rules relating to practice before the masters, about notice to parties that the report is in draft, and to appear before the Master and settle it. 'As soon as his report is ready' 'the Master shall return it into the clerk's office,' and 'the parties shall have one month from the filing of the report to file exceptions thereto.' The report is ready within the meaning of rule 83, when it is written."

This case was decided by Judge Gresham, January 21, 1882. Afterwards on May 12, 1883, this same case came on for hearing before Mr. Justice Harlan, Circuit Justice, on a motion to recommit to the Master and for leave to file exceptions. On full hearing Mr. Justice Harlan overruled the motion to recommit, and granted leave to file exceptions only to so much of said report as raised matters of law, or related to matters not embraced in the order of reference. By this ruling Mr. Justice Harlan fully and in all respects affirmed the ruling of Judge Gresham on the point here presented for consideration. In view of this authority and the universal practice in the District of Indiana at least, and as before stated almost, if not quite the universal practice throughout the sixth, seventh and eighth Circuits, it is submitted that the second proposition presented by Mr. High is utterly untenable.

III.

The third proposition of Mr. High is that these appeals present no question to this Court because the order of June 18, 1885, was a final decree, and that no appeal having been taken from that final decree the question of priority of lien of equipment rental over mortgage bonds cannot be here presented to the Court.

The order of June 18, 1885, was a mere interlocutory order and was not appealable. Taking this order alone, who would have been appellees? Against whom could Kneeland have appealed? It names no persons owning cars, it fixes no amount to be paid from the purchase money fund for equipment rental and repairs. It is, in fact, simply an order of reference to Master Fishback to inquire and report on the matter of equipment rental and repair, and giving him instructions as to the method to be used in making his investigations and computations. This order was the beginning of the real contest regarding equipment rentals and repairs. Under this order Master Fishback filed his first report on December 7, 1885, to which exceptions were duly filed. But, before any hearing on these exceptions the Master, discovering some errors pointed out by the exceptions, filed amendments to his report on December 28, 1885. The exceptions were refiled to the report as amended. Hearing was had on those exceptions by the Court and they were sustained in part, *and the order of June 18, 1885, was materially changed and modified.*

The Master on February 23, 1886, filed his final report in accordance with the direction of the order of February 8, 1886. To this final report Kneeland filed exceptions. On April 5, 1886, the Court heard full argugument on these exceptions, overruled them and entered

the decree here appealed from. All these matters are carefully pointed out, and citations to the record given, in my original brief, pages 39, 40.

It is idle to say that the order of June 18, 1885, was a final decree and properly appealable. It settled nothing finally. On February 8, 1886, it was materially changed and modified. The final report of Master Fishback, Kneeland's exceptions to that report, and the ruling thereon, and the entering of final decree by Court, and appeal from that final decree, brought every question regarding equipment rental and repair, and priority of lien of such claims over mortgage bonds, before this Court.

This is not an open question in this Court. It is very evident that the order of June 18, 1885, did not terminate the litigation. Something, very much, remained for the Court to do before the litigation ended. It is settled and established law that no order or decree is final, in the sense that it can be appealed from, unless it finally terminates the litigation between the parties.

"The rule is well settled and of long standing that a judgment or decree to be final, within the mean- of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance, here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. * * * If the judgment is not one which disposes of the whole case on its merits, it is not final."

Bostwick v. *Brinkerhoff*, 106 U. S., 3.r4.

"A decree cannot be said to be final until the court has completed its adjudication of the cause. Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought; that is to say, a setting off to the complainant in severalty her share of the property in money or in kind. This can only be done by a further decree of the court. Ordinarily, in chancery, commissioners are appointed to make the necessary examination and inquiries and report a partition. Upon the coming in of the report the court acts again. If the commissioners make a division the court must decide whether it shall be confirmed before the partition, which is the primary object of the suit, is complete. If they report that a division cannot be made and recommend a sale, the court must pass on this view of the case before the adjudication between the parties can be said to be ended."

Green v. *Fisk*, 103, U. S., 519, 520.

"It has been contended for the appellees, that the appeals by Porter now under consideration are appeals only from the decree of October 9, 1886; that he did not perfect any appeal from the decree of February 16, 1886; that the latter decree was a final decree; that the errors which Porter now insists on were errors committed in entering the decree of February 16, 1886; and that none of the errors now assigned can be considered by this court, because of the want of any appeal from the decree of February 16, 1886, and because the adjudications now complained of were made by that decree, and not by the decree of October 9, 1886.

"It is a sufficient answer to these contentions to say, that the decree of February 16, 1886, though a final de-

cree of forclosure and sale as respected the interest of the mortgagor, and in some other respects, was not a final decree in respect of the matters involved in these appeals. The sixth clause of that decree merely provided that all unpaid, valid claims against the company for right of way, lands, labor, rolling-stock, and material used in the construction and betterment of the railway, were prior, superior, and paramount to the lien of the mortgages and the bonds; but determined nothing as to who were the holders of such claims, or as to what were their amounts. It designated no persons who could be appellees in any appeal by Porter in respect of such claims, and it provided for a reference to ascertain who were the several claimants under the sixth paragraph of the decree, and what were the amounts due to them severally."

Porter v. *Pittsburg Bessemer Steel Co.*, 120 U. S., 677.

These cases are precisely in point and show clearly that the third proposition of Mr. High is utterly untenable.

IV.

The fourth proposition of Mr. High is that the receivership was a single continuous receivership from August 1, 1883, to January 1, 1885. That is to say, the claim is asserted that there is no difference or distinction between the receivership of four months under the creditor's bill brought by Braman and the receivership under the foreclosure suits which extended from December 1, 1883, to January 1, 1885.

Here again the learned counsel has fallen into error in his statement of facts. At page 43 of his brief he says: "In his exceptions to the final report of the Mas-

ter concerning car rentals, upon which the decree of April 5, 1886, was entered, appellant took no exceptions to the allowance of rentals from December 1, 1883, to January 1, 1885, his only exception upon this point being to their allowance during the four months of the Dwight receivership."

This is an amazing statement when tested by the words of the exceptions. Kneeland in his exceptions, says: "To each and every of the Master's findings and report herein, the said complainant and said purchaser for their exceptions assign the following causes." The exceptions then contain nine separate causes or assignments; some of these causes or assignments refer to the Dwight receivership as a separate and distinct receivership from the receivership under the foreclosure suits, and others cover the entire matter of equipment rental and repair, attacking the allowance of any rental as prior in lien to mortgage bonds, and attacking the computations as made, and the method by which they were made. The fifth exception presents the question of priority of lien squarely. It reads as follows: "Because the said orders and decrees under which the said Master has made and filed his said report of February 23, A. D., 1886, are contrary to law and equity."

The fourth, sixth, seventh, eighth and ninth exceptions are all directed to the entire report. The prayer is: "And exceptors further pray that the orders and interlocutory decree under which the said Master has made and filed his said report, may be revoked, set aside, and held null and void, and that the Court may enter a decree that no rent whatever is due or payable either from the said railroads or the proceeds of the sale thereof to any or either of said intervening petitioners."

(Rec. in Cause No. 252, pp. 552, 553, 554.)

How the learned counsel could make the above statement in the face of these clear and explicit statements of the exceptions is past comprehension.

This brief presents, probably for the first time, the proposition that because a creditor's bill makes the mortgage trustees, as well as the railroad company, defendants, that, therefore, the receivership instituted under the creditor's bill is a receivership under the mortgages, and for the benefit of the mortgagees. At page 47 of his brief Mr. High naively says: "The bondholders having received the full benefit of, and protection afforded by the receivership in the Braman suit, and by its extension to the foreclosure suit, they cannot now escape its burdens by seeking to divorce the receivership in the latter case from that in the former."

What benefit and protection did the bondholders receive from the receivership under the Braman suit? They had received no interest for thirteen months before that receivership was instituted. They received no interest from the earnings of that receivership. There is no claim or pretence that any part of the earnings of that receivership were expended in adding betterments and improvements to the mortgaged estate. There is no claim or pretense that any part of the earnings of the railroad company during an entire year prior to the establishment of the receivership under the Braman suit were expended in adding betterments and improvements to the mortgaged estate. How then were the bondholders benefited by that receivership? Is it a benefit and protection to the mortgagees to institute a receivership at the instance of an unsecured creditor, and for that creditor's receivership to incur indebtedness over and above all income, at the rate of one thousand dollars per

day? If so, benefit and protection have ceased to hold their usual meaning. The benefit and protection afforded by the receivership under the Braman bill to the mortgagees was that bestowed by the wolf upon the lamb in the ancient fable.

The claim that the order extending the receivership to the foreclosure suits was *an adoption by the mortgagees of the entire receivership under the Braman bill*, is utterly without foundation. The mortgagees brought foreclosure suits on the several divisions, and prayed the appointment of a receiver. Dwight was not acceptable as a Receiver. Trouble arose between the Circuit Courts of the sixth and seventh Circuits, regarding the appointment of a Receiver for the entire property in both Circuits. Through the influence of Hon. Thomas A. Hendricks, W. J. Craig was chosen as acceptable to both Courts. It then became necessary to get rid of Dwight as Receiver. In order to effect that end an order was entered extending the then existing receivership to the foreclosure suits, and at the same time, and as part of the same proceeding, Dwight resigned and Craig was appointed. The record clearly shows this state of facts.

(Rec. in Cause No. 252, p. 72.)

This order extending the receivership to the foreclosure suits was simply an easy method of closing up the receivership under the Bramen bill, and instituting the receivership under the foreclosure suits.

No one thought then, it is hardly possible that anyone can think now, that this order adopted the Dwight receivership as a receivership in behalf of the mortgagees.

The mortgagees asked for an independent receivership, and they obtained it by getting rid of and closing

up the Dwight receivership in the way above stated. Suppose the mortgagees had not asked for any Receiver when they brought their foreclosure suits, but had simply asked a speedy foreclosure and sale without any receivership. Will any one contend that in that case the mortgagees could be held liable to pay the indebtedness of the Dwight receivership, over and above its entire income, out of the *corpus* of the mortgaged estate?

We insist that there is a wide difference between the Dwight receivership under the creditor's bill brought by Braman, and the Craig receivership under the foreclosure suits brought by the mortgagees.

But, in this case the difference is not very material in determining results because there was no diversion of earnings to the benefit of bondholders under either receivership; neither was any valuable right, privilege or franchise preserved for the bondholders by either receivership. The facts establishing these statements were given in full in my original brief and need not be here repeated.

V.

The fifth and last proposition advanced by Mr. High in behalf of appellees is, that car rentals during the receivership are entitled to priority over mortgage indebtedness. In opening his argument in support of this proposition, the learned counsel restates his technical points of practice upon which he seems to place his chief reliance. These technical, practice points have been above considered, and, if I can understand the decisions of the Courts in carefully considered cases hereinabove cited, have been finally disposed of.

One statement of counsel found on page 51 of his brief, ought, perhaps, to be noticed. It is this: "Indeed, as appears throughout the entire record, the right

of appellees to recover rentals from the date of the extension of the receivership under the Braman bill to the foreclosure suit, was substantially conceded throughout the litigation in the Court below. The sole contention upon the part of the bondholders in that Court was to prevent the allowance of rentals during the Dwight receivership, and for six months prior thereto, and to reduce the allowance as far as possible for the use of the cars after the extension of the receivership to the foreclosure cases."

If the learned counsel were as familiar with the record of this litigation as he assumes to be, he could not make and reiterate such a statement. I have already shown by citations to the record, and by quotation of the words of the exceptions of Kneeland to the Master's report as found in the record, that this statement is incorrect, and without any foundation whatever to rest upon. It is well known to all the counsel engaged in this litigation that the Bondholders Committees and Kneeland as trustee for and representative of the bondholders, by counsel, have always, and in all possible ways, objected to, and protested against, the allowance of a penny to any or either of these appellees for the use of their equipment for or during any portion of the time from August 1, 1883, to January 1, 1885. The fact of this continued protest against any payment to these appellees for the use of their equipment, and the insistence of counsel in behalf of the bondholders and Kneeland as their representative upon this point, are evidenced by numerous briefs on file in this cause in the Circuit Court or that have been on file at some time during the litigation.

At every hearing of this cause in the Circuit Court

counsel for the bondholders, and for Kneeland after he became representative of the bondholders, urged the Court to reject entirely the claims of these appellees. If Mr. High has been connected with the litigation from its inception, and if he has been present at any of the many hearings, he cannot fail to know this fact personally. If he had come now for the first time into the litigation, the records of these appeals, carefully read and considered, would prevent the making of such an assertion.

Quotations above made from the exceptions of Kneeland to the Master's report—which exceptions appear in the record of Cause No. 252 at pages 552, 553, 554—effectually dispose of this erroneous statement and all the pages of argument and quotations of authority in its support.

This fifth proposition of Mr. High is quite fully discussed in my original brief. Hence no extended discussion is here necessary, but it may, however, be proper to notice two or three of the points presented. The grounds stated in support of the proposition are:

1. That the use of the equipment of these appellees by the receivers was an *absolute necessity*; and that the earning capacity of the railroad, both before and during the receiverships, was due almost entirely to the use of this rolling stock. The words used by the learned counsel are: "It is also to be remembered that the continuous use of this equipment by the Receiver was an absolute necessity to keep the road in operation as a going concern. * * * Whatever earning capacity the road possessed, either before or after the appointment of the Receiver, was due almost entirely to the use of this rolling stock."

In support of these statements a lengthy extract

from the evidence of Receiver Craig is quoted. There are two answers to the statements, either of which is abundantly sufficient to negative the statements of the learned counsel for appellees.

First. It is abundantly proved by the record that the road never, either before or during the receiverships, earned its operating expenses. Hence its earning capacity by reason of this equipment need not be further considered.

(See my original brief, pages 42 to 48.)

Second. It is absolutely proved by the record that the use of this equipment was *not necessary;* and instead of being beneficial to the mortgagees was the source of very heavy loss to them without considering or taking into account any rental for its use.

It is shown by the record that the bondholders from the outset besought the Court to compel these appellees to take away their equipment; and that after they obtained such an order the road was operated with less than *one-third* of the equipment formerly used, and a considerable part of this reduced equipment belonged to the company.

In this connection I desire to call attention to another erroneous statement of the record made by the learned counsel. At page 91 of his brief he says: "January 20, 1885, an order was entered, the Bondholders Committee appearing by their counsel (pages 360, 361) ratifying the form of proposed lease, and the monthly rentals, and directing the Receiver to lease upon the terms specified the following equipment," and follows this statement with the list of the equipment which by the order the Receiver was authorized to use under the reduced operation of the road. That

this is not a correct statement is best proved by the record itself. The exact words of the order in the record are: "That the form of the proposed lease of rolling stock submitted by said Receiver as part of his said report be approved, and that said Receiver be authorized to hire upon the terms specified in said lease *so many of each class of rolling stock as shall, taken with those of each class already in the possession of the Receiver and not the subject of any trust*, amount in number as follows, to-wit: Lomotives 15, Coal Cars 75, Stock Cars 25, Pay Car 1, Box Cars 300, Flat Cars 50, Passenger Cars 10, Cabooses 11."

This order shows clearly that the Receiver was required to use all of the equipment belonging to the company as a part of the above list and was only authorized to lease the remainder of the above list after taking into account all of the equipment of the company.

2. The second argument in support of priority of lien for equipment rental is that receivership earnings were diverted to the payment of operating expenses accrued prior to the receivership. Even if this were true, it would be no argument in support of the proposition unless it could be further shown that the earnings of the road prior to the receivership were diverted to the benefit of the bondholders in payment of bond interest or in betterments and improvements to the mortgaged estate.

The record shows conclusively that no earnings either prior to or during the receiverships were diverted to the benefit of bondholders in any way.

Citations to the parts of the record proving this statement appear in my original brief.

Here again the learned counsel has fallen into error.

He professes to have discovered a clear diversion of $120,000 of receivership earnings. On page 60 of his brief he quotes detached sentences from the report and petition of Receiver Craig, filed May 1, 1884, and the order of Court entered upon said petition on May 5, 1884. A careful reading of the petition of Receiver Craig shows that the money which Mr. High claims to have been diverted to the payment of operating expenses accrued prior to the receivership, was mainly applied to the payment of operating expenses during the Dwight receivership. After stating that the company was largely indebted to its employes and operatives at the time Dwight was appointed Receiver, the petition states: "That to retain their services and continue the operation of said road it was necessary to pay the arrears of wages due operatives; that on debts the payment of which was imperative for the preservation of property, *and on such arrears of wages by E. E. Dwight, Receiver, and your petitioner,* about $120,000 has been paid from the moneys received as earnings of said road since it has been in the hands of a Reciver; and that at the time E. E. Dwight, Receiver, the predecessor of your petitioner turned over said property to your petitioner *there was due operatives and employes of the said Dwight, Receiver,* eighty-eight thousand two hundred and nineteen and sixty-three one-hundreths dollars in excess of the moneys and credits by said Dwight delivered to your petitioner applicable to the payment of such claims. (Rec. in Cause No. 212, p. 130.)

This petition then goes on to ask the Court for leave to borrow on Receiver's certificates $150,000.00. The Court granted the petition. Receiver Craig borrowed the money and issued Receiver's certificates there-

for. These Receiver's certificates, together with the $94,000.00 of Receiver's certificates, issued by Dwight a few days after he was appointed, have been paid out of the purchase money fund, as is well known by every person familiar with the records in this cause. How it could be possible under such circumstances for counsel to claim that there has been any diversion of receivership earnings to the benefit of the bondholders is a mystery that I will not undertake to fathom. Instead of this petition and order showing any diversion, they show conclusively that neither receivership earned its operating expenses, and that the Court first under Dwight put a lien of $94,000.00 by way of certificates on the property to pay operating expenses with, and under this order put $150,000.00 more of Receiver's certificates on the property for the purpose of paying mainly receivership operating expenses. Hence the attempt upon the part of the learned counsel to apply any of the decisions of this Court touching diverted earnings to any of the earnings of the receiverships in this case or to any of the earnings of the company prior to the receiverships must result in utter failure.

3. One further point is made by Mr. High in support of the priority of lien of the equipment rental, and that is that this equipment and its use by the Receivers protected and conserved the franchises, rights and privileges of the railway company and therefore was beneficial te the bondholders. It has already been shown in the original briefs in behalf of appellant that the use of this equipment was not necessary in order to preserve any franchises. The very fact that the road was continued in operation after this equipment was all delivered to its owners by hiring only a very small portion of the equipment belonging to one or two of these appellees

to use in connection with the equipment belonging to the Company, is proof positive that the use of the equipment of these appellees here claimed for was not necessary to preserve any franchise right.

It is very abundantly proved by the record that it would have been a blessing to the bondholders if long prior to or on August 1, 1883 all the appellees had withdrawn every piece of their equipment from the company. It would have been infinitely better for these bondholders to have had the operation of the road as a railway stopped rather than have it continued as it was under the receiverships at a dead loss of from $500, to $1,000 per day.

It is believed that the foregoing pages contain a sufficient reply to the positions assumed by Mr. High in his briefs. His brief in Cause No. 1537 contains, I believe, no new or different position from the positions mentioned and assumed in his main brief in Cause No. 252.

I have also just this moment received a copy of the brief of Mr. Henry D. Hyde of counsel for appellees. This brief presents no different positions or propositions than those presented in the briefs of Mr. High. An examination of these briefs in behalf of appellees have served to confirm me in the full belief that the appellees are not, in equity, entitled to any payment whatever for the use of their equipment during either of the receiverships.

Appellant prays that the decrees of the Circuit Court may be reversed.

R. G. Ingersoll, New York. Respectfully submitted,
Clarence Brown, Toledo, O. BY
Solicitors for Appellant. John M. Butler,
Of Counsel for Appellant.

Indianapolis, Ind., March 28, 1890.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 252.

SYLVESTER H. KNEELAND, APPELLANT,

v.

THE AMERICAN LOAN AND TRUST COMPANY, OF BOSTON, ET ALS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR THE AMERICAN LOAN AND TRUST COMPANY, OF BOSTON, AND E. B. PHILLIPS, TRUSTEE.

HENRY D. HYDE,
SAMUEL WILLISTON,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 252.

SYLVESTER H. KNEELAND, APPELLANT,

v.

THE AMERICAN LOAN AND TRUST COMPANY OF BOSTON ET ALS.

BRIEF FOR THE AMERICAN LOAN AND TRUST COMPANY.

STATEMENT OF FACTS.

The facts giving rise to this appeal arose out of the insolvency and foreclosure of the railroad system of the Toledo, Cincinnati & St. Louis Railroad Company.

This railroad company was formed by the consolidation of two other companies, each of which was itself a complex organization, — the Toledo, Delphos & Burlington Railroad Company and the Toledo, Cincinnati and St. Louis Railroad Company (in the States of Indiana & Illinois). The consolidation was completed about Feb. 23, 1882, by the ratification of the stockholders. On June 1, 1883, the Cincinnati Northern Railway Company was also united with the system.

The western line of the consolidated system extended

from Toledo, Ohio, through Delphos, Ohio, Kokomo and Frankfort, Indiana, to East St. Louis, Illinois. Branch roads extended in Ohio from Delphos to Dayton, and thence southerly to Cincinnati and southeasterly to Ironton.

See Record, page 191, *et seq.*, for detailed statement of consolidated lines.

The first-mortgage bonds had been issued by the various shorter lines prior to the consolidation, so that separate suits or decrees of foreclosure were necessary.

Proceedings began on August 1, 1883, by the filing of a bill by Grenville D. Braman in the Circuit Court for the seventh circuit alleging a judgment in his favor against the Toledo, Cincinnati & St. Louis Railroad Company, which was unsatisfied, and could not be satisfied, and praying for the appointment of a receiver and for the sale of the road to satisfy his judgment. The Central Trust Company, of New York, and Thomas A. Hendricks, being trustees for first-mortgage bondholders, were made party defendants and appeared by their counsel.

Record, page 2.

On Oct. 20, 1883, a bill was filed in the same court against the railroad and others, by the Central Trust Company and others, representing the first-mortgage bondholders of the Toledo, Delphos & Burlington Railroad Company, praying a sale of the property covered by the mortgage, being the main line from Toledo, Ohio, to Kokomo, Indiana, for default in paying the interest on the bonds.

Record, page 25.

On June 16, 1884, a bill was filed in the same court against the railroad and others by Edward F. Leonard, and others representing holders of bonds issued on a portion

of the Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois) before its consolidation with that road, namely: the Frankfort & State Line Railroad Company, praying a sale of this portion of the road and the application of the proceeds in satisfaction of their bonds.

Record, page 135.

On June 17, 1884, a bill was filed in the same court against the railroad and others by the Central Trust Company of New York and others, representing first-mortgage bondholders of the Toledo, Cincinnati & St. Louis Railroad Company (of Indiana and Illinois) praying for the foreclosure and sale of the road, which extended from Kokomo, Indiana, to East St. Louis, Illinois, and included the line of the Frankfort & State Line Railroad, for default in paying the interest on the bonds.

Record, page 151.

The last two bills were consolidated on July 17, 1884.

Record, page 188.

On Aug. 2, 1883, a receiver was appointed, in accordance with the prayer of the first bill, over the whole railroad system.

Record, page 14.

On Nov. 27, 1883, the receivership already existing was extended over and made to apply to the premises and property sought to be foreclosed in the foreclosure bills.

Record, page 72.

The litigation was thenceforth conducted as a whole, so far as possible, similar steps being taken by stipulation simultaneously in the various suits.

Numerous intervening petitions were filed by creditors, trustees and holders of bonds issued under equipment leases and car trusts, among whom were the appellees.

Reference to Jacob D. Cox as special master was made April 5, 1884, and on June 26, 1884, the master filed a full report, setting forth the various lines constituting the system and the liens and incumbrances thereon, the condition of the rolling stock, the proper rentals to be allowed for rolling stock needed to operate the system, and sums required for repairs and destruction of cars.

Record, page 189.

Exceptions were taken by the various parties, and argument had.

On Dec. 1, 1884, the Court found that the sums due for rentals and repairs accruing during the receivership and for replacing rolling stock destroyed during the same period were a prior lien on the proceeds of the road, the exact amount being left for computation later, and it was ordered that the rolling stock be delivered up to the owners or their representatives on January 1, 1885.

Record, page 300.

The amounts due on the various mortgages having been determined by reference to a master,

Record, page 322,

and the rates of rental for rolling stock having been determined by the Court, it was again decreed that the sums thus allowed should be a prior and paramount lien, to be paid out of the receiver's net earnings, if any, and otherwise out of the proceeds of the foreclosure sale.

Record, page 434.

Reference was made to William P. Fishback as master to determine the amount due for rentals, repairs and replacing destroyed rolling stock.

Record, page 436.

The master reported his findings in two reports, and exceptions being taken and the Court decreeing certain changes in the methods of computation, a third report was made.

Record, pages 488, 506, 535, 538.

On or about August 1, 1884, the receiver surrendered certain portions of the system in Ohio, known respectively as the Dayton Division, the Cincinnati Division, the Dayton and Southeastern Division, the Cincinnati Northern and Iron Railroad.

See Record, pages 434, 435.

On November 9, 1885, a decree of sale was made in both foreclosure suits,

Record, pages 461, 470,

and on December 30, 1885, a sale of both divisions of the railroad,

Record, pages 509, 515,

was made in accordance with the decrees to the appellant, representing bondholders, both of the Toledo, Delphos & Burlington Railroad and of the Toledo, Cincinnati & St. Louis Railroad (in the States of Indiana and Illinois), and the sales were duly confirmed by order of the Court,

Record, pages 532, 533.

The master, William P. Fishback, made his final amended report on the amounts due for car rentals, repairs and replacing destroyed cars on February 18, 1886.

Record, page 538.

After argument, a final decree was made, in accordance with this report, providing, "That there are due to the several complainants for car rentals, repairs, and for cars destroyed from both the divisions of said railroad known as the 'Toledo Divisions" and the 'St. Louis Division,' the following amounts: —

"To the American Loan and Trust Company for rentals, repairs, and for cars destroyed under series F, G, H, I, K, L, and M of the Boston car trust, and under series D of the Massachusetts car trust, the sum of $51,174.96.

"That there is due to the American Loan and Trust Company and the Grant Locomotive Works for rental and repairs under series C of the Massachusetts car trust, the sum of $6,476.29.

. . . . . .

"That there is due to E B. Phillips for rentals and repairs under series H of the Massachusetts car trust the sum of $13,261.32. The Court doth thereupon order, adjudge, and decree that each of said several claimants for car rentals, cars destroyed, and repairs aboye named do have and recover the amounts so found due to them respectively, as above set forth, with interest thereon at the rate of six per cent, from the date hereof, which said sums respectively are hereby ordered, adjudged, and decreed to be a prior and paramount lien upon all the railroad property and effects of every nature and kind pertaining to each of said divisions respectively, and prior to the rights and interest of the bondholders and purchasers thereof, and of all persons claiming by,

through, or under them, or either of them, which said sums shall be paid out of the proceeds of the foreclosure sale of said divisions, prior to any distribution of the proceeds among the holders of the bonds secured by the mortgages thereon."

Record, page 570.

From this decree the appellant, as representative of the first-mortgage bondholders, appealed.

As the questions involved in this appeal relate only to the allowance of a prior lien to the owners of rolling stock, it is necessary to state more fully the facts relating to the so-called car trusts or equipment leases.

In order to provide themselves with rolling stock, the Toledo, Delphos & Burlington Railroad and the Cincinnati Northern Railroad Company, being among the roads consolidated into the Toledo, Cincinnati & St. Louis Railroad Company, made arrangements with the manufacturers or owners of engines and cars for the "loan" to the respective companies, for a definite period, varying from four to ten years, of certain rolling stock enumerated in the lease.

Special Master Cox refers to these leases and analyzes and enumerates their provisions as follows: —

Record, page 208.

"By far the greater part of all the rolling stock upon this whole railway system is included in certain contracts known as 'equipment leases,' all of which have the same general character.

"In them the manufacturer, owner, or other person in possession of engines, cars, etc., contracts to 'loan' to the railroad company, termed the 'lessee' for a definite period, varying from four to ten years, certain rolling stock enumerated in the lease

"The railroad company agrees to pay certain annual payments of money equal in number to the years of the continuance of the contract, with semi-annual interest upon the deferred payments.

"The payments so to be made are the agreed value of the rolling stock, and upon the completion of such payments the rolling stock becomes the absolute property of the railroad company for a merely nominal consideration.

"Upon the receipt of the rolling stock the railroad company delivers to the so-called lessor, or to a trustee designated for the purpose, its equipment bonds with coupons attached, the face of the bonds of equal amount with the agreed price, and the coupons of equal amount with the agreed interest, and both payable at the agreed times.

"These bonds are negotiable, and the holders of the same are, by the contract made with the 'lessor,' a company (not a corporation), called a 'car trust,' with a designation as a 'series,' there being as many 'series' as there are separate 'equipment leases' and deliveries of rolling stock and bonds reciprocally. This organization of 'car trusts' is a device to enable the holders of the bonds by purchase to act together, through the trustee, for the purpose of enforcing the contract and of becoming the owners of whatever interest the original lessors may have retained in the rolling stock under the contract.

"The contracts contain a defeasance clause, by virtue of which, upon the failure of the railroad company to make payment of principle or interest as the same becomes due, the car trust has the right to enter upon the railway, take possession of the rolling stock, sell the same at public auction, and apply the proceeds to the payments due and to become due, the balance, if any, to be paid to the railroad company.

"The railroad company agrees to keep the rolling stock in

repair, and at the end of the term to have it in as good condition as when received, 'reasonable wear and tear alone excepted,' and to make good losses by destruction by substituting for the destroyed cars or engines others of similar and equally valuable construction. The name of the car trust and series is to be painted upon each car and engine."

The American Loan and Trust Company of Boston, and E. B. Phillips, two of the appellees in this suit, and in whose behalf this brief is filed, were trustees under such leases as are above described; the American Loan and Trust Company, under series F, G, H, I, K, L and M of the Boston car trust, and under series C and D of the Massachusetts car trust, and E. B. Phillips under series H of the Massachusetts car trust.

The agreements of lease of the Boston car trust series were made with the Toledo, Delphos and Burlington Railroad Company and that of the Massachusetts car trust series nominally with the Cincinnati Northern Railroad Company (page 213), before the consolidation of these and other railroads into one system, as the Toledo, Cincinnati & St. Louis Railroad Company, but most if not all of the rolling stock was actually delivered to the consolidated railroad, and the obligation of the car trusts was assumed by it, and the rolling stock so delivered was used over the whole system. In the case of the Massachusetts car trust series, indeed, the contract " nominally made with the Cincinnati Northern Railway Company was negotiated by the officers of the Toledo, Cincinnati & St. Louis Railroad Company, just prior to the consolidation of the former into the latter, and with the mutual understanding that the locomotives were procured for the general use of the latter company. The rolling stock was delivered to the railroad during the years 1882 and 1883."

Record, page 213.

In their intervening petitions, the American Loan and Trust Company and E. B. Phillips prayed long prior to January 1, 1885, to be allowed to remove the rolling stock belonging to the series of which they were trustees.

Record, pages 186, 187.

But they were not able to obtain any great part of it until January 1, 1885, when, a decree having been made directing the receiver to give it up, the petitioners, after some trouble, obtained what was left of their property. No part of the interest or principal of the bonds secured by the car trusts was ever paid, nor were any rentals for the use of the rolling stock ever paid. The rolling stock, when returned, was greatly depreciated in value by hard usage and few repairs, and a large number of cars had been totally destroyed; and most of this damage had taken place under the receivership; and the justice of some award to the appellees for rentals and depreciation is obvious.

On this appeal two questions only can arise, it would seem: —

I. Whether the appellees are entitled to the priority of lien on the proceeds of the foreclosure sale, which was given their claim for rentals, repairs and replacing destroyed cars, as against the first-mortgage bondholders.

II. Whether the amount decreed by the Court is greater than it should be.

I.

The Appellees' Right to Priority of Lien.

It was ruled, both by Special Master Cox and by the Court, that the effect of the contract under which the rolling stock was held was a conditional sale, the vendees retaining title to secure the payment of the price. (Record, pages

209, 301.) Whether this is the true construction or whether the contract should be held simply a lease, it is at least certain that the title to the rolling stock was in the manufacturers or trustees under the agreements, and that this ownership was distinctly asserted by the painted inscription on each car.

Similar means of obtaining rolling stock have often been resorted to of late years by railroads whose immediate resources or credit were insufficient to enable them to purchase outright what they needed, and similar questions to that involved in this cases have several times within the last twelve years been presented to this Court for decision,—not only in regard to rolling stock but also materials and supplies necessary for the conduct of the business of common carrier.

It has been regarded as settled ever since the decision of *Fosdick* v. *Schall*, 99 U. S. 235, that circumstances might arise under which certain classes of creditors might be given priority in the distribution not only of the income of a railroad but also of the funds realized by a sale of the property itself; and this principle has been frequently cited with approval, and, where circumstances warranted, applied.

Wallace v. *Loomis*, 97 U. S. 146.
Myer v. *Car Company*, 102 U. S. 1.
Miltenberger v. *Logansport Railway Co.*, 106 U. S. 286.
Union Trust Co. v. *Souther*, 107 U. S. 591.
Burnham v. *Bowen*, 111 U. S. 776.
Union Trust Co. v. *Illinois Midland Railway Co.*, 117 U. S. 434.
Union Trust Co. v. *Morrison*, 125 U. S. 591.
St. Louis, &c. Railroad v. *Cleveland, &c. Ry.*, 125 U. S. 658.

And see

Meyer v. *Johnston*, 53 Ala. 237.

Coe v. *N. J. Midland Ry. Co.*, 27 N. J. Eq. (12 C. E. Green) 37.

Thomas v. *Peoria and R. I. Ry. Co.*, 36 Fed. Rep. 808.

The classes of creditors thus preferred are those whose claims are for labor, materials, supplies or equipment, without which the railroad could not continue to operate.

The reasons for which the preference is made are two: —

First. Because the current income of the road has been misapplied, in that it has been used to pay the interest on bonds, instead of being devoted primarily to the payment of current expenses. This misapplication of the income, out of which the creditors should have been paid, gives them a right in equity to charge the property or its proceeds as against the bondholders, since the latter have received the benefit of the misapplication.

Second. A further principle is this: that, though a railroad is unable to pay its expenses and charges, it is of fundamental importance that its tracks be kept in reasonable repair, that its employees be retained, that it should have necessary locomotives and cars, and that they should be kept in repair, and that it should have coal and other supplies, otherwise, it cannot be operated as a railroad; and this may, and probably will, result in forfeiture of its franchises, and waste or ruin of its road and other property. To preserve the property, and to enable it to be disposed of as a going concern, what is absolutely necessary is allowed to be procured in the only way in which it can be, — that is, by making the expense necessitated a preferred claim. The interest of the public in the maintenance of a railroad system adds force to this.

The general principle, and the reasoning on which it rests, were completely stated by Mr. Justice Blatchford, speaking for the Court, in the case of *Union Trust Company* v. *Illinois Midland Railway Company*, 117 U. S. 434, 455, as follows: —

"Property subject to liens and claims and debts of various characters and ranks, which is brought within the cognizance of a Court of Equity for administration, and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the Court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but, if perishable, it must be sold, by way of preservation. A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good-will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporators, but to furnish a public highway, and all persons who deal with the corporation as creditors or holders of its obligations must necessarily be held to do so, in the view that, if it falls into insolvency and its affairs come into a Court of Equity for adjustment, involving the transfer of franchises and property, by a sale, into other hands to have the purposes of its creation still carried out, the Court, while in charge of the property, has the power and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve

the public. Its power to do this does not depend on consent, nor on prior notice. Consent is desirable, but is seldom practicable where the debts exceed the value of the property. Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity, as in this case, to be heard on evidence as to the propriety of the expenditures and of making them a first lien is judicially equivalent. The receiver and those lending money to him on certificates issued on orders made without prior notice to parties interested take the risk of the final action of the Court in regard to the loans. The Court always retains control of the matter, its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments."

The appellees do not rest their case upon a diversion of the income of the railroad to pay the interest on the bonds, but rather on the necessity of the debts contracted for rolling stock or for its use in order to operate and preserve the railroad as such for the interest of the bondholder, and the public.

Their rights to the priority allowed them by the Court below therefore depends on the question whether the expenditures or debts contracted for rentals were necessary to preserve the railroad as a going concern.

In the first place, it is to be observed that each case must rest upon its own particular facts. Under some circumstances an expenditure may be absolutely necessary which under other circumstances may be wholly unnecessary. All the circumstances of the case must be taken into account. For this reason great weight should be attached to the decision of the lower court. The facts are more fully before it than they can be presented on appeal. At every step an order is obtained from the Court, and, if the order prayed is of

doubtful expediency or legality, all interested have an opportunity of contesting it. While, therefore, it cannot be laid down as a general proposition that expenditures or debts incurred during a receivership for the lease or purchase of rolling stock are necessarily entitled to priority of lien, yet it is certainly true that, if imperatively needed, they may well be entitled to such priority. As is said by a text writer of reputation, "Upon principle, it is impossible to discriminate between claims of this character and those for wages, materials and other operating expenses, which, as already shown, have been frequently allowed priority out of receiver's income, or have been paid out of the sale of the property in the absence of any evidence of diversion of income, upon other equitable considerations addressing themselves to the discretionary powers of the Court." High on Receivers (2d ed.), § 394 *f*.

A particular examination of the cases decided by this Court in which have arisen the question of the allowance of expenditures for rolling stock by a receiver as a lien on the *corpus* of the property prior to that of mortgage bondholders serves only to emphasize the fact that such allowance depends in each case upon the particular circumstances of that case, and that where the lower Court has acted upon correct principles the appellate Court relies largely upon its discretion in applying them, and is slow to disturb allowances or disallowances made with a fuller knowledge of all the facts of the case than can possibly be gained upon appeal.

In the case of *Wallace* v. *Loomis*, 97 U. S. 146, "the receivers were authorized by the order appointing them, amongst other things, to put the road in repair and operate the same, and to procure such rolling stock as might be necessary, and for these purposes to raise money by loan to an amount named in the order, and issue their certificates of

indebtedness therefor; and the order declared that such loan should be a first lien on the property, payable before the first-mortgage bonds." This Court upheld this exercise of power by the Court appointing the receiver, though stating that, if possible, it should be done by consent of all interested in the fund, and finding that "the parties most materially interested," if they did not expressly consent to the order, "offered no objection to it." The language of the Court, however, recognizes the power and right to allow such a lien if necessary, without consent, and, as said in a later case, "Wallace had not become a party to the suit until several months after the order complained of was made." *Miltenberger* v. *Logansport Railway Company*, 106 U. S. 286, 310.

In the case of *Fosdick* v. *Schall*, 99 U. S. 235, the appellee had furnished the railroad, afterwards foreclosed, two hundred and twenty-five cars under a contract of conditional sale, the company giving notes for the price of the cars and the cars remaining the property of the seller. Over a quarter of the amount of these notes was paid by the company. About two years after the contract was made the company went into the hands of a receiver appointed by a State Court. A few months thereafter the case was removed into a circuit court of the United States, and another receiver appointed, who, finding the cars necessary for the use of the railroad, made a bargain with the owner to pay a fixed rent, and it was agreed that if this was paid promptly for five years with interest on the deferred payments, the title should pass to the company. Payments were accordingly made by this receiver during all the time he was in possession, On a foreclosure sale, the principal contest was whether the title to the cars could be claimed by Schall as against prior mortgagees. The Court below decreed that Schall was entitled to possession of his cars and

also to rent for six months preceding the appointment of receivers by the State Court, and for the few months before the removal of the cause to the circuit court, to be paid out of the proceeds of the sale of the road. This Court affirmed the decree as to the title of the cars, but reversed it as to the rental allowed, fully recognizing, however, that in many cases such expenditure should be allowed. But here it is to be noticed that Schall had got his cars back, had received over a quarter of their price, and had received full rent from the receiver appointed by the Circuit Court, at a rate based on the cars eventually becoming the property of the railroad, which never happened. The Court might well say, "In short, as the case stands, no equitable claim whatever has been established upon the fund in court."

In the case of *Myer* v. *Car Company*, 102 U. S. 1, the defendant car company, which had leased its cars to a railroad company, was held entitled as against the first-mortgage bondholders to the possession of its cars and to compensation for their use by the receiver; the Court saying, "There can be no doubt that it is the duty of a Court to pay from the trust fund it has in possession all the debts it incurred in its judical capacity while administering the trust assumed, pending the litigation, in behalf of the litigating parties."

In the case of *Miltenberger* v. *Logansport Railroad*, 106 U. S., 286, the lower Court authorized, among other things, the purchase of rolling stock necessary for the use of the company, and allowed the expense thereby incurred to be discharged from the proceeds of the property sold in priority to the mortgage bondholders. The Court asserts again the power to authorize receivers of a railroad to incur expense necessary for the preservation and management of the property, and says that "the facts set forth in the petitions of Sept. 9, and 30, 1874, on which the order of Oct. 3, 1874, was based, show ample reasons for making that order in

respect to the purchase of rolling stock and the adjustment of liens thereon and the construction of the Clymer Division and the bridge." The decree was affirmed.

The most exhaustive treatment of the whole subject is to be found in the opinion of Mr. Justice Blatchford in giving the decision of the Court in the case of *Union Trust Company* v. *Illinois Midland Railway Co.*, 117 U. S. 434. There were cross appeals by bondholders from the allowance of priority to certain receivers' certificates and by creditors from disallowance of their claims. After laying down the general principles which should govern cases of this kind, it was decided that certificates for necessary repairs were entitled to priority over mortgages; also, it appearing that "the Court authorized the receiver to purchase engines and cars and to adjust liens on cars," and that claims thus arising were afterwards allowed to be paid out of the proceeds of the sale before the mortgage bonds, this Court upheld such priority." Page 457. It is true that certain claims for rents for use of rolling stock and for extraordinary depreciation of rolling stock were not allowed in one of the cross appeals, but the facts on which the claim was based do not appear, and the language of this Court in disallowing the claim is to be noticed. "The Court [below] did not allow it priority, and we see no sufficient ground for reversing the decision." So far as concerned the priority of claims over the first-mortgage bond, the decision of the Circuit Court was affirmed. The case serves to emphasize both the general doctrine contended for by the appellees and also the reliance placed on the decision of the lower Court and the discretionary power it has in dealing with such matters.

In the case of *Thomas* v. *Peoria and R. I. Railway Company*, 36 Fed. Rep. 808, Mr. Justice Harlan held that a claim for rent of cars used during a receivership might be

charged on the income during the receivership, and if that was inadequate, upon the proceeds of the mortgaged property.

An application of the principles derived from the preceding cases will show these appellees fully entitled to such relief as was granted them; and there are also special equities in their favor.

As appears from the report of special master J. D. Cox, "by far the greater part of all the rolling stock upon this whole railway system" was included in the equipment leases, or car trusts (Record, page 208), and though the car owners "could not have found a market for this rolling stock if thrown upon the market as the consequence of the failure of this narrow-gauge system," yet the road "could not have found other similar rolling stock to take its place if deprived of it."

In the intervening petitions of these appellees they prayed for leave to remove their rolling stock. If they had been allowed to do this at once they would have had what they asked and what they wished. No question as to subsequent rentals would then have arisen. But they were not allowed to do this, the Court deeming it more equitable to allow the receiver the use of the rolling stock, since it could not be immediately replaced, and was necessary for the operation of the road; the question of what were reasonable terms for such usage being referred to a master for determination.

After this course has been carried out, and the appellees have had their legal right to the possession of their rolling stock abridged or denied, and finally received the rolling stock back much deteriorated by hard usage over ill-made and insufficiently repaired roads, it would be to the last degree inequitable to take from them the remuneration on the faith of which the receiver was allowed the use of the rolling stock. It is too late to prevent the use of the rolling stock; the

compensation of the owners should, therefore, not be taken away. As a matter of fact, the arrangement was as good an arrangement as could have been made. But it is not necessary to go so far; for the question is not what can now be seen to be most advantageous, but what at the time a decision was made looked best in the light of what was then apparent; and this Court will be slow to disturb a judgment carefully considered at the time it was made. Nevertheless, the appellees are not afraid of taking the burden upon themselves, and asserting that it does positively appear from the record that the action of the Court was proper, and, indeed, necessary, and they feel confident that a perusal of the report of Special Master Cox (Record, page 189) will convince the Court of this.

The allowance made for the repairs and destruction of cars stands upon exactly the same ground as the allowance for rentals. All was part of the same transaction. In order to compensate the appellees for the use of their rolling stock, it was necessary either to pay such a rental as would remunerate the owners for the incidental loss and damage to their property which must inevitably occur, or else, while paying a smaller rental, pay for repairing and replacing the injured and destroyed cars. Both come to the same thing in the end; but as the rental in this case was based on the supposition that the cost of repairs and the value of destroyed cars were also to be given, it would be inequitable to disallow these expenses without increasing the regular rental by an amount sufficient to make up.

The decree also provides that rent shall be paid for the period of six months next before the appointment of a receiver, out of the net earnings, if any, of the receiver, but not out of the proceeds of the sale of the property. This also was clearly within the discretionary powers of the Court appointing the receiver, as shown by the cases pre-

viously cited. The rent of the rolling stock being properly an operating expense, arrears due immediately before the appointment of a receiver might properly be ordered discharged out of the earnings of the road before the bondholders could claim that such earnings should go toward the payment of their claims. As there were no net earnings during the receivership, however, the point is immaterial, and the appellant cannot possibly have been aggrieved.

The date from which rentals, etc., were allowed to be paid from the proceeds of the sale was August 1, 1883, the date of the appointment of the first receiver, at the suit of a judgment creditor. It is no valid objection to such allowance that the receiver was not appointed at the request of the bondholders. The propriety of the allowance rests on the fact that the property was continuously in the hands of the Court by its receiver, from August 1, 1883, and no matter at whose request it came there, the Court must deal with the whole property as its best interests and the interests of the public demand. Moreover, the Central Trust Company and Thomas A. Hendricks were made parties to the creditors' bill, and all parties interested had abundant opportunities to be heard and were heard in regard to the matter.

See *Wallace* v. *Loomis*, 97 U. S. 146, where an order allowing priority to certificates for similar expenses was upheld, though, as said in referring to the case in *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286, 310, the appellant "Wallace had not become a party to the suit until several months after the order complained of was made."

See also *Union Trust Co.* v. *Illinois Midland Railway Co.*, 117 U. S. 434, where it was expressly held, as the head note concisely puts it, "It is no objection to this rule [allowing priority to certificates for necessary repairs] that the suit in which the first receiver was appointed was not brought by the bondholders or their trustees."

II.

The Amount Allowed.

The amounts recommended by Special Master Cox for rentals and the amounts allowed by the Court are as follows :—

	Recommended by Master per month.	Allowed by Court per month.
For locomotives	$160 00	$115 00
" passenger cars	50 00	36 00
" baggage, express, and cabooses	25 00	18 00
" box cars	8 00	5 00
" stock cars	12 00	8 00
" coal cars	7 00	4 50
" gondolas	7 00	4 50
" flat cars	6 00	3 50

Record, pages 212 and 234.

Special Master Cox further found that an average sum of $1,000 apiece was needed to put the locomotives in repair and an average sum of $20 a piece to put the cars in repair. In pursuance of an order of the Court of December 1, 1885, the receiver had an examination made of each piece of rolling stock and an estimate made of the amount necessary to put it in repair. The total thus allowed was $10,874. At the rate estimated by Special Master Cox the amount would have been $69,096. That is, the receiver's estimates amounted to less than one sixth of the estimate of Special Master Cox. The allowance appearing to the Court insufficient, the Court decreed that fifty per cent should be added to the amount estimated in the receiver's report for locomotives and twenty-five per cent to the amount estimated for cars.

On the termination of the lease of the rolling stock by the receiver, William P. Fishback as master determined the

total amounts due to the owners according to the rates fixed by the Court. (Record, page 488.) The Court on exceptions cut these amounts down considerably, though they were based on its own previous decree. (Record, page 535).

It thus appears that the Court reduced the amount of rentals recommended by Special Master Cox from twenty-seven per cent to over forty per cent, and awarded for repairs an amount between the varying estimates which had been made, and afterwards made a horizontal reduction of fifteen per cent on the allowance for rentals. (Record, page 536.)

The amounts which were finally allowed were fixed after full argument and investigation, and the large reductions made from the original amount suggested by Special Master Cox show that if error was made it was at the expense of the appellees, in that so small an amount was allowed them.

As the rolling stock was used over the whole system, and as the mortgages were on the separate divisions, and as certain divisions went out of the receiver's hands before the rolling stock was surrendered, a somewhat elaborate scheme of apportionment among the various divisions of the amount chargable for rentals, repairs, and replacement of cars was made necessary. Special Master Cox reported a scheme of apportionment distributing the expense "in the proportion of the miles actually run by cars, etc., on the several divisions." (Record, page 214). For the twelve months from August 1, 1883, to August 1, 1884, when all the divisions were included in the receivership, the Court decreed that the rentals should be charged to the various divisions in those proportions, and for the remaining five months of the receivership the rentals were made a charge on the three divisions still remaining in the receiver's hands, in the same proportion which the percentages of those divisions for the first year of the receivership bore to each other. The

charges for repairs of the rolling stock in the hands of the receiver were distributed in the same proportions: $\frac{12}{17}$ among all the divisions and $\frac{5}{17}$ among the three divisions remaining in the receiver's hands during the five months preceding January 1, 1885.

It is submitted that this arrangement is a just and fair one — as nearly theoretically accurate as it could be made, and that the appellant was in no wise aggrieved by it.

In conclusion, it is to be said that the matters involved in the insolvency of the railway system in question were extremely complicated. The proceedings taken by the Court were passed upon by three judges: Judges Drummond, Gresham, Woods, and the final decision was made after the fullest investigation and with all the aid which masters and counsel could give. All parties interested had full opportunities to be heard and were heard. These circumstances should give the greatest weight to the result finally reached.

HENRY D. HYDE,
SAMUEL WILLISTON,

Of Counsel for the American Loan and Trust Company of Boston, and E. B. Phillips, Trustee.

MAR 24 1890

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 252.

SYLVESTER H. KNEELAND, *Appellant*,
vs.
THE AMERICAN LOAN AND TRUST COMPANY OF BOSTON ET AL., *Appellees.*

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF DAVID B. PAUL, TRUSTEE, AND THE UNITED STATES ROLLING STOCK COMPANY, APPELLEES.

JAMES L. HIGH,
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BARNARD & GUNTHORP LAW PRINTERS, CHICAGO

IN THE

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Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF AND ARGUMENT IN BEHALF OF DAVID B. PAUL, TRUSTEE, AND THE UNITED STATES ROLLING STOCK COMPANY, APPELLEES.

STATEMENT.

This is an appeal by Sylvester H. Kneeland as purchaser, under foreclosure sales, of the two divisions of the Toledo, Cincinnati and St. Louis Railroad, from a decree of the Circuit court for the district of Indiana, awarding to appellees priority over first mortgage bonds in payment of rentals for rolling-stock used by the receivers of the road.

The Toledo, Cincinnati and St. Louis Railroad Company was a consolidated corporation made up of many constituent companies incorporated in Ohio, Indiana, and

Illinois. It operated a line of narrow-gauge railway from Toledo to Delphos, Ohio, thence to Dayton, with branches from Dayton to Cincinnati, and to Ironton; and also from Delphos to St. Louis. The final consolidation was effected in June, 1883.

January 17, 1880, the Toledo, Delphos and Burlington Railroad Company, one of the constituent companies which became merged in the final consolidation, executed a mortgage or deed of trust to the Central Trust Company of New York, conveying its line of road then being constructed from Toledo, Ohio, to Kokomo, Indiana, to secure 1250 thirty year bonds of $1,000 each, bearing date January 1, 1880, with interest at six per cent. per annum, payable semi-annually. Under the terms of the mortgage the trustee was authorized to take possession and to institute foreclosure proceedings upon six months' default in the payment of interest coupons, after demand for such payment.

July 23, 1881, the Toledo, Cincinnati and St. Louis Railroad Company, one of the constituent companies merged in the final consolidation, executed a deed of trust to the Central Trust Company of New York, and to Thomas A. Hendricks, as trustees, conveying its line of road then being constructed from Kokomo, Indiana, to East St. Louis, Illinois, to secure 3,000 thirty year bonds of $1,000 each, with interest at six per cent. per annum, payable semi-annually, with like provisions as to default and foreclosure.

The line of road covered by the first mortgage above described from Toledo to Kokomo, is known throughout these proceedings as the Toledo Division of the Toledo, Cincinnati and St. Louis Railroad, and that covered by the mortgage last described, extending from Kokomo to

East St. Louis, is known as the St. Louis Division. The appeal is from the allowance of car rentals apportioned to these two divisions.

December 1, 1881, the United States Rolling Stock Company, one of the appellees herein, leased to the Toledo, Delphos and Burlington Railroad Company, one of the constituent companies merged in the final consolidation, 200 coal cars and 91 flat cars, under an equipment lease known as "Boston Car Trust Series H," and on the same day leased to the same company 80 box cars and 37 stock cars under an equipment lease known as "Boston Car Trust Series M." July 10, 1882, the United States Rolling Stock Company leased to the Toledo, Cincinnati and St. Louis Railroad Company, one of the constituent companies merged in the final consolidation, 250 box cars, under an equipment lease known as "Massachusetts Car Trust Series A."

August 1, 1882, John G. Blain and Marshall C. Blain, copartners under the name of Blain Brothers, to whose rights David B. Paul as trustee succeeded by assignment, leased to the Toledo, Cincinnati and St. Louis Railroad Company 500 box-cars, 150 coal-cars and 50 sets of trucks, under an equipment lease known as "Mas-
"sachusetts Car Trust Series B." February 1, 1883, Blain Brothers leased to the same company 350 coal-cars and 150 stock-cars, under an equipment lease known as "Massachusetts Car Trust Series G." The rolling stock embraced in all these leases was delivered to the lessees at or soon after the dates of the leases, and was used indiscriminately on all the divisions of the consolidated road, both before and after the appointment of the receiver, and during the entire period for which rentals were allowed by the Circuit court. Other rolling stock was leased to

the various constituent roads by other of the appellees herein, under similar equipment leases, and was used in the same manner.

These equipment or car-trust leases, are all substantially in the same form. (Record, 37, 49, 57.) By these leases the manufacturer or owner of rolling stock leases it to the railroad company for definite periods, varying from four to ten years in the leases in controversy, the company agreeing to make certain annual payments, equal in number to the number of years covered by the lease, with semi-annual interest upon the deferred payments. The principal payments thus to be made are the agreed value of the rolling stock, and upon the completion of the payments it becomes the property of the railroad company for a nominal consideration. The railroad company delivers to the lessor or to a designated trustee what are known as its equipment or car-trust bonds, with coupons, the face of the bonds being the amount of the car rentals or the agreed purchase price. These bonds are negotiable and pass by delivery. The lease contains a clause of defeasance, authorizing the lessor or trustee to take possession of the rolling stock upon default in any payment of rental or interest. The lease provides that the rolling stock shall remain the property of the lessor until all payments are completed, and that each car shall be marked with proper marks indicating the ownership of the lessor and descriptive of the car trust. This was done in all cases here involved. The leases are by their terms assignable. Those in which the United States Rolling Stock Company was interested as lessor were assigned to the American Loan and Trust Company, as trustee for the holders of the equipment bonds secured by those leases. The trust company hav-

ing declined to institute proceedings herein for the protection of the United States Rolling Stock Company, the latter company filed its own petitions of intervention, and the decree of the Circuit court fixed the amount of rentals due to the Rolling Stock Company for that portion of its equipment embraced in these leases. The leases of the firm of Blain Brothers were by them duly assigned to David B. Paul as trustee for the holders of the equipment bonds secured by these leases. Petitions of intervention were filed by Paul as trustee under such assignment, and the amount of rentals due to him was fixed by the decree.

August 1, 1883, Grenville D. Braman filed in the Circuit court a creditors bill (page 2) alleging the recovery of a judgment against the railroad company; the return of execution unsatisfied; the history of its various consolidations; the existence of mortgages upon each of the constituent roads in the States of Ohio, Indiana and Illinois, and the hopeless insolvency of the company. The bill averred that the Central Trust Company of New York was trustee in all the underlying mortgages upon the different divisions of the road, and that Thomas A. Hendricks, of Indianapolis, was co-trustee in the mortgage upon the St. Louis division, hereinbefore described. The consolidated railroad company, the Central Trust Company and Hendricks were made defendants to the bill which prayed for the appointment of a receiver. On the same day (page 12) the railroad company and the Central Trust Company entered their appearance and waived service of process.

August 2, 1883, Edward E. Dwight was appointed receiver under the creditors bill of Braman (page 14). The order appointing the receiver recites the appearance

of the railroad company and of the Central Trust Company, and it was "thereupon ordered, adjudged and decreed, said Toledo, Cincinnati and St. Louis Railroad "Company assenting thereto, and the said Central Trust "Company of New York not objecting thereto, that Edward E. Dwight be appointed temporarily receiver "herein upon his giving bond * * * and that as "such receiver he is hereby ordered and directed to take "possession of, maintain and operate said railroad and "premises described in said bill of complaint * * * "and the said receiver is hereby clothed with all the authority and rights usually given to a receiver by courts "of equity, to take charge of, care for and operate a railroad; to make a report of his acts and doings at least "every two months to the court; to collect and receive "the tolls, income, rents, issues and profits of said premises, and out of the same to maintain and keep the "property safe and in good repair; to pay the debts due "for wages, materials and supplies which have been incurred during the operation and maintenance of said "property during the six months last past." Upon the same day Dwight filed his bond, which was approved, and immediately entered upon the duties of his receivership. Upon the same day (page 16) the record recites the following: "Comes now Thomas A. Hendricks, "trustee, one of the defendants in the above entitled "cause, by R. C. Bell his solicitor, and waives the issue "and service of process and enters his appearance herein, "and does not object nor assent to the appointment of a "receiver."

August 16, 1883 (page 17), the court ordered the receiver to borrow $94,000 for payment of wages due employes on the pay-roll for June, 1883, and to give receiver's

certificates therefor, which were made a first lien upon the road, the trustees objecting to the issuing of the certificates.

October 20, 1883, the Central Trust Company filed its bill (page 25) for the foreclosure of the mortgage upon the Toledo division, hereinbefore described, alleging default in the payment of the interest coupons for January 1 and July 1, 1883; that payment had been duly demanded, and that many of the holders of the bonds had demanded that the trustee foreclose the mortgage and procure the appointment of a receiver. The bill alleged the insolvency of the company and prayed for a foreclosure and for the appointment of a receiver. Braman, the Toledo, Delphos and Burlington Railroad Company, as mortgagor of the Toledo division, and the Toledo, Cincinnati and St. Louis Railroad Company were made defendants.

November 27, 1883, an order was entered in the foreclosure suit (page 72) reciting the filing of the creditors bill by Braman and the appointment of a receiver thereunder. The order then provides as follows: "Now, on "motion of Thomas E. Stillman, solicitor for said Central "Trust Company, it is ordered that the receivership al-"ready existing under the order heretofore entered is "hereby extended over and made to apply to the prem-"ises and property sought to be foreclosed in this action." On the same day (page 72) Dwight tendered his resignation as receiver. November 28, 1883, (page 73), orders were entered in both the causes accepting the resignation of Dwight and appointing William J. Craig as receiver in his stead. By this order Craig was "vested "with all the usual rights and powers of receivers in such "cases, and especially with all the rights and powers which "were heretofore conferred upon Dwight as such re-

"ceiver". December 1, 1883 (page 74), Craig filed his bond as receiver, which was approved by the court, and he immediately entered upon the discharge of his duties.

November 1, 1884, by an order entered in the Braman suit (page 84) the receiver was authorized to issue receiver's certificates, which were made a first lien upon the entire road, in the sum of $101,025.91, for the payment of various claims for construction for which the capital stock of the Frankfort and State Line Road, a part of the St. Louis division, had been pledged as collateral, which stock was about to be sold to satisfy these demands.

February 21, 1884, an order was entered in the foreclosure suit (page 90) authorizing the receiver to issue certificates which were made a first lien upon the entire road, for the sum of $42,500, for the purchase of steel rails, bolts, spikes and angle-plates to be used on the line from Toledo to Kokomo.

February 26, 1884, the railroad company filed answers in both suits (pages 94 and 98) admitting the indebtedness alleged, its default and its insolvency.

March 6, 1884, an order was issued in the Braman suit (page 103) authorizing the receiver to issue certificates which were made a first lien upon the entire road, for the sum of $12,921.98, for the payment to W. F. Ritchie and Company for lumber and cross-ties used in construction prior to the receivership, which claim was one of the demands secured by the deposit of the capital stock of the Frankfort and State Line Company, as above stated.

Petitions of intervention were filed in both suits by the United States Rolling Stock Company and David B.

Paul, trustee (pages 35, 44, 74, 104 and 112). These petitions set forth the history of the various car-trust leases under which petitioners claim; delivery of the equipment to the railroad company under each of the leases; its continuous use by the company prior to the appointment of the receiver, and by the receiver since his appointment; that the use of the rolling stock by the receiver is necessary to the successful and proper operation of the road; the assignment of the leases and default in the payment of semi-annual interest on the car-trust bonds as well as installments of principal. The petitions prayed that the receiver might be required to pay the past due installments of principal and interest, as well as the future installments of rental as they should accrue; that he should be required to carry out all the covenants of the railroad company under the leases, and for general relief.

Pending the foregoing proceedings in the Seventh Circuit, bills were filed by the Central Trust Company in the Sixth Circuit in the Northern and Southern Districts of Ohio for the foreclosure of the various mortgages upon the respective divisions of the consolidated road in Ohio. In those cases also William J. Craig was appointed receiver, and appellees filed in those suits petitions of intervention similar to those above recited.

April 11, 1884, an order of reference was entered in the foreclosure case of the Central Trust Company in the Seventh circuit, referring the claims for car rentals to Jacob D. Cox, as special master, duplicate orders of reference having been entered April 5, 1884, in the Ohio cases. By this order (page 127) the master was directed to report the amount of rolling stock upon the road with the various liens and claims thereon; how much

of the rolling stock, not covered by the mortgage, was in use by the receiver; the "propriety or necessity of the "continued use and employment on the road of any part "of said rolling stock or equipment not covered by said "mortgage"; what would be a fair and just compensation to the owners for the past and future use of such rolling stock, and what deterioration it had suffered both before and after the appointment of the receiver, with various other matters not pertinent to the issues here involved.

May 1, 1884, receiver Craig filed a petition in both cases (pages 129, 130), setting forth that he and his predecessor Dwight had paid out of the earnings of the road, while in their hands as receivers, $120,000 for arrearages of wages prior to the receivership and upon indebtedness, "the pay-"ment of which was imperative for the preservation of "the property"; that demands were made upon the funds in the hands of the receiver which were imperative for the preservation of the property, and which were not connected with the operation of the road, and that from such causes he was unable to pay the wages of operatives then due, and praying leave to borrow $150,000 and to issue certificates therefor.

May 5, 1884, orders were entered in both cases (pages 133, 134), authorizing the receiver to borrow $150,000, to be used in paying operating expenses and labor claims due by the receiver, and to issue certificates therefor which should be a first lien upon the road. These orders contain the following recitals: "It appearing to the court "from the accounts of said receiver, filed in court, that "large sums of money had been paid from the receipts "of said road while it had been in the possession of the "receiver upon the debts due by said company, incurred

"prior to the appointment of the receiver, and that other "moneys have been paid where necessary for the preser- "vation of said property, which are not chargeable to "operating expenses," etc. The Central Trust Company consented to this order.

June 16, 1884, Edward F. Leonard, as the holder of twenty-five of the first mortgage bonds of the St. Louis division, filed a bill (page 135) for the foreclosure of that mortgage, alleging default in the payment of interest, and the failure of the trustees, the Central Trust Company and Hendricks, to institute foreclosure proceedings in Indiana, averring that the trustees had filed a bill for foreclosure and procured the appointment of a receiver in the Circuit court of the United States for the Southern District of Illinois.

June 17, 1884, the Central Trust Company filed its bill (page 152) for the foreclosure of the mortgage upon the Toledo division, praying for the appointment of a receiver.

July 2, 1884, an order was entered (page 188) consolidating the suits of Leonard and of the Central Trust Company to foreclose the mortgage on the St. Louis division, the order directing that the two causes thenceforward proceed as one under the name and title of the Leonard suit. From this time forward the two foreclosure suits, viz: the original bill for foreclosure by the Central Trust Company of the mortgage on the Toledo division, and the consolidated suit for the foreclosure of the mortgage on the St. Louis division proceeded *pari passu* by consent of all parties in interest, the subsequent orders and proceedings being generally entitled in both causes.

July 17, 1884, Jacob D. Cox, special master, filed his report under the order of reference concerning car rentals above cited (page 189), together with the testimony and depositions taken before him (pages 608 to 802), a dupli-

cate of the report and testimony being filed in the Ohio cases under like orders of reference there. The master finds that the greater part of the rolling stock in use on the road was held under the car-trust leases described, which he finds to be conditional contracts of sale, the title remaining in the lessors until completion of payments; that it was reasonably built for the purposes intended, and that it was accepted by the officers of the company in good faith and without fraud or collusion. He finds that the rolling stock was only adapted for use upon a narrow-gauge system; that the system of narrow-gauge railways had come into discredit at about the time of the appointment of the receiver in these cases, the embarrassments of this road being an important factor leading to such result, and the consequent depreciation in the market of narrow-gauge rolling stock. He also finds that the conditions noted at the beginning of the receivership resulted in nearly equal disadvantages to the owners of the rolling stock and to the receiver operating the road. He also reports as follows (page 212):

"He finds that the former (the owners) could not have found a market for this rolling stock, if thrown upon the market as the consequence of the failure of this narrow-gauge system, and that the latter (the receiver) could not have found other similar rolling stock to take its place if deprived of it.

"He finds, therefore, that the property being in the hands of the court, it is equitable and fair that, pending the final disposition of the causes, neither party should take advantage of the supposed necessity of the other, but that justice will be done if the rental during the receivership be fixed at what would be an ordinary renting price of engines and cars of similar cost upon standard-gauge roads.

"He finds further that it is now impracticable to ascertain the exact condition of each of the thousands of pieces of property constituting this rolling stock at the time the receiver entered into possession of it, but that it

had already become 'second-hand' property. He therefore finds that the receiver should take it as such property is taken on standard-gauge roads when rented in accordance with usual custom, to be turned back to the owners at the end of the term in what is understood by railway machinists to be in good working order and condition, the age and ordinary wear and tear of the engines and cars considered; and that the receiver should not be chargeable with any other sum, whether as deterioration or depreciation, than such ordinary rentals and such cost of putting the rolling stock in good repair.

"The master found the testimony on the subject of the value of such rentals very divergent. He accepted as a general basis of his conclusions the testimony of Mr. Hegewisch, President of the United States Rolling Stock Company, who, though representing a party in interest, seems to give candidly the results of the largest experience in the actual renting of standard-gauge rolling stock, it being evident from causes already reported that there is no market price for rental of narrow-gauge equipment. This testimony will be found to be near the mean between the extremes given by others. It states that the maximum prices named by this witness are for exceptional kinds and sizes of cars or engines which would not be in ordinary demand, and that the lower prices are usually agreed upon when the rental is of very large lots of rolling stock at once.

"The master finds that the following rates are a fair rental during the receivership for the rolling stock in question, viz:

Locomotives	$160 per month.
Passenger coaches	50 per month.
Baggage, express cars and cabooses	25 per month.
Box cars	8 per month.
Stock cars	12 per month.
Coal cars	7 per month.
Gondolas	7 per month.
Flat cars	6 per month."

He also finds (page 213) that an average sum of $20 per car is needed to put the cars in good repair. He also reports (page 214) a table of percentages for the distri-

bution of car rentals upon the eight different divisions of the road covered by as many different mortgages in the States of Ohio, Indiana and Illinois. These percentages are based upon a careful computation of car mileage made by the accounting officers of the receiver, which the master finds to be accurate, being the mileage actually made by the cars upon the eight divisions, from November 1, 1883, to May 1, 1884. This table of the percentages of distribution was adopted in all subsequent proceedings relating to the allowance of car rentals, including the final decree from which this appeal is taken.

June 28, 1884, four of the Ohio divisions of the road operated by the receiver were sold under decrees of foreclosure in the suits instituted by the Central Trust Company in the United States Circuit court for the Southern district of Ohio. July 18, 1884, these sales were confirmed by that court, and on August 1, 1884, these divisions had been delivered to the respective purchasers. After August 1, 1884, there remained in the possession and management of the receiver, only what is known as the main line of the road from Toledo to St. Louis, including the Toledo terminal division, the Toledo division and the St. Louis division. Upon these divisions the receiver continued to use a part of the rolling stock held under the car-trust leases until the same was surrendered to the owners on and after January 1, 1885, as hereinafter stated.

November 10, 1884, James M. Quigley, James T. Harbeck and John McNab, a committee of bondholders under the mortgage of the Toledo division, presented their petition in the foreclosure suit against that division, praying that they be joined as com plainants therein. (Page 268.) On the same day James M. Quigley, Halsey J.

Boardman and Charles W. Pierce, a similar committee of bondholders under the mortgage of the St. Louis division, presented a like petition in the foreclosure suit against that division, praying that they be joined as complainants in that suit. (Page 283.) On the same day orders were entered in each of the suits, admitting the petitioners as co-complainants. (Pages 283, 286.) Exhibit A, annexed to and made a part of these petitions, is an agreement between the mortgage bondholders of the two divisions, respectively, and the respective committies, constituting the latter the trustees of the bondholders, to purchase these divisions at the foreclosure sales and to procure the organization of a new company to take the title.

November 28, 1884, Quigley and his co-complainants in the Leonard suit filed their petition (page 287), praying that the receiver be directed to surrender to the owners all rolling-stock not belonging to the road.

No objections were taken before Special Master Cox to his report, nor were any objections tendered to or taken before any of the masters by any of the parties in interest as to any of the subsequent reports upon car rentals involved in this controversy. Any and all objections by any of the parties in interest to either and all of these reports were presented for the first time by exceptions after the filing of the reports in court.

Exceptions having been filed by various parties in interest to the report of Special Master Cox, these exceptions came on for argument, together with the petition of Quigley and others for the surrender of the cars to their owners, on December 1, 1884. The court thereupon ordered (page 301) that the car-trust leases were contracts of conditional purchase and sale; that no

such demand had been made by appellees and other holders of car-trust leases to retake possession of their equipment and no such refusal had been made by the court or its receiver as to warrant a conversion, and that there was no obligation upon the court or its receiver to comply with the terms of the original contracts; that the intervenors were entitled to the immediate possession of their equipment and the receiver was ordered on or before January 1, 1885, to surrender to the intervenors and all holders of car-trust leases all their rolling stock after inspecting the same, and to report an itemized statement of his inspection and of all needed repairs. The order reserved for future determination the question of the amount of rental to be paid for the use of the equipment, the time for which it should be computed and the amount of damages to the intervenors for lack of repairs, as well as for loss and destruction of equipment. In pursuance of this order the rolling stock embraced in the car-trust leases was delivered by the receiver to the various owners at various dates from and after January 1, 1885.

January 1, 1885, an order was entered at the request of the trustee and of the bondholders' committee represented by James M. Quigley (page 321), directing the receiver to withdraw all trains except one mixed train for freight and passengers each way daily, and to lease, or otherwise procure the necessary equipment for the operation of such trains only, and to discharge all employes not absolutely necessary to the operation of the road as thus limited, paying them in receiver's certificates not to exceed $35,000 in amount. By the same order a reference was had to William P. Fishback, Master, to report within ten days the amount due upon the mortgages. January 8, 1885, the master's report was filed

showing the amount due under the mortgages (page 322).

January 13, 1885, the receiver filed a report of his inspection of the cars (page 326).

March 5, 1885, an order of reference was entered (page 369) to J. E. Rogers, as Special Master, to take further proof as to the condition of the rolling stock and the extent of the repairs necessary to put the same in good condition. The master took the testimony of various witnesses who had inspected the cars, both in behalf of the receiver and of the various owners, and reported the same to the court (pages 802 to 1055).

June 18, 1885, a hearing was had upon the report of Special Master Cox above referred to, and upon the exceptions thereto, and upon the report of Special Master Rogers. An order was thereupon entered (page 434) decreeing that the owners of the rolling stock have and recover for the use of their equipment from the date of the appointment of E. E. Dwight, as receiver in the Braman case, viz.: August 1, 1883, to January 1, 1885, at the following rates, viz.:

Locomotives	$115 per month.
Passenger cars	36 per month.
Baggage, express and caboose cars	18 per month.
Box cars	5 per month.
Stock cars	8 per month.
Coal cars	4.50 per month.
Gondolas	4.50 per month.
Flat cars	3.50 per month.

The reductions thus made from the monthly rentals reported by Special Master Cox (page 212), average from thirty to thirty-five per cent. upon the various

classes of equipment. The order allowed for repairs to the equipment the amounts shown in the inspection made by Receiver Craig, as set forth in the report of Special Master Rogers, with the addition thereto of fifty per cent. for repairs to locomotives, and twenty-five per cent. for repairs to cars. The order also provided as follows:

"The court does further order, adjudge and decree, that all such rentals and repairs are a prior and paramount lien to, be paid out of the net earnings, if any, of the receiver, or if such earnings shalll be insufficient thereto, then the same shall be paid out of the foreclosure sales of the mortgaged premises prior to any distribution of such proceeds among the holders of the bonds secured by said mortgage."

Similar priority in payment was given to the various owners of equipment for their cars destroyed after August 1, 1883. It was also ordered that the rentals at the same rates for six months prior to Dwight's appointment as receiver, August 1, 1883, be paid out of the net earnings, if any, of the receiver, but not out of the proceeds of the sale of the mortgaged premises until after payment of the mortgage debt.

The order further provided that the rentals from August 1, 1883 to August 1, 1884, being the date of the surrender by the receiver of the four Ohio divisions sold under the foreclosure proceedings in the Sixth Circuit, be apportioned among, and paid by the respective divisions according to the percentages reported by Special Master Cox, as follows, viz:

DIVISION.	PER CENT.
Toledo Terminal	0.40
Toledo Division	23.79
Dayton Division	12.98
Dayton and Southeastern Division	32.67
Iron Railroad Division	1.98
Cincinnati Division	1.36
Cincinnati Northern Division	4.16
St. Louis Division	22.66

For the rentals due from August 1, 1884 to January 1, 1885, being the period in which the rolling stock was used by the receiver on the three divisions of the road remaining in his possession after the sale of the Ohio divisions, the same basis of distribution was adopted, as follows, viz:

DIVISION.	PER CENT.
Toledo Terminal	0.40
Toledo Division	23.79
St. Louis Division	22.66

It was further ordered that twelve-seventeenths of the allowances for repairs be apportioned among the eight divisions upon the basis of percentages above shown, and that the remaining five-seventeenths of such allowances be distributed among the three divisions last named, upon the basis of percentages above shown. This distribution for repairs was based upon the fact that the equipment was used for seventeen months in all, viz: from August 1, 1883, to January 1, 1885, during the first twelve months of which period the receiver operated the entire eight divisions, and during the remaining five months he operated only the three divisions extending from Toledo to St. Louis. The order also directed a reference to William P. Fishback, Master, to compute the amounts due to the

various owners of the equipment on the basis above set forth. From this order the owners of the equipment prayed and were allowed appeals, which were never perfected. No appeal was ever taken from this order by the trustee or by any of the mortgage bondholders, or by any person in like interest.

November 11, 1885, decrees of foreclosure were entered against both the Toledo and St. Louis divisions (pages 461–470). By these decrees the purchasers at the foreclosure sales were required to pay in cash all indebtedness which shou'd be adjudged to be due as court and receiver's indebtedness and prior in equity to the mortgage liens.

November 7, 1885, the report of William P. Fishback, Master, was filed (page 488) with his computations of the amounts due to the various owners of rolling stock as fixed by the terms of the order of June 18, 1885, above set forth. No objections were taken before the Master to this report, but exceptions were filed in behalf of the bondholders after the report was returned into court and on December 7, 1885, (page 501).

December 28, 1885, Master Fishback filed an amendment to his report of December 7, 1885, correcting certain errors in computation in his former report, by reducing the rental charged to the three divisions remaining in the receiver's possession from August 1, 1884, to January 1, 1885, and charging against those three divisions, for the period named, rentals for such equipment only as remained in the possession of the receiver during that period. (Page 506.) No objections were taken before the master to this amended report, but the exceptions filed by the bondholders to the original report were refiled as to the amended report. (Page 509.)

December 30, 1885, the masters' reports of sales under the two foreclosure decrees were filed, reporting the sale of each division to Sylvester H. Kneeland, (pages 509 to 515), the Toledo division having been purchased by Kneeland for $600,000, and the St. Louis division for $901,000.

February 5, 1886, the masters' reports of sales in both cases were confirmed, and it was ordered that upon compliance with the terms of sale the purchaser be let into possession. (Pages 532, 533.)

February 8, 1886, the exceptions to the original report of Master Fishback concerning car rentals of December 7, 1885, and to his amended report of December 28, 1885, were argued, and the court ordered certain modifications to be made in the master's findings as to the apportionment among the different divisions for lost and destroyed cars and for necessary repairs. (Page 535.) By the same order (page 536), the court made a further arbitrary reduction of fifteen per cent. in the amount of rentals, which with the former reduction reduced the rentals to be allowed to the owners of the equipment to about fifty per cent. of the amounts originally reported by Special Master Cox. All exceptions to the master's reports inconsistent with the order were overruled. Some of the owners of equipment prayed and were allowed appeals from this order reducing their rentals, but their appeals were never perfected. No appeal was ever taken from this order by the trustees, or by the purchaser or bondholders, or by any person in like interest.

February 23, 1886, Master Fishback filed his report of computations of the amounts due for car rentals under the order of February 8, 1886. (Page 538.) No objections were taken before the master to this report, but after it

was returned into court, and on February 26, 1886, Quigley and other bondholders, with Kneeland, the purchaser, filed exceptions. (Page 552.) These are the only exceptions taken by Kneeland to any of the masters' reports on car rentals. Neither in these exceptions, nor in any of the previous exceptions taken by the Quigley bondholders, or by the Central Trust Company, is any exception taken to the allowance for rentals from December 1, 1883, to January 1, 1885, the principal exception being to the allowance of rentals during the Dwight receivership from August 1, 1883, to December 1, 1885.

April 5, 1886, a hearing was had upon the exceptions to the report of Master Fishback, filed February 23, 1886, of his final computations of the amounts due to the owners of equipment (page 570). The exceptions were overruled, the master's computations were confirmed, and there was adjudged to be due to the appellee David B. Paul, for rentals, repairs and cars destroyed from the Toledo and St. Louis divisions, the sum of $48,518.64; to the appellee, the United States Rolling Stock Company, the sum of $22,959.12, and various sums to other appellees herein, the aggregate amount thus allowed against the two divisions being $158,708.89, for which amount judgment was entered. The judgment was declared to be a prior and paramount lien upon all the property of the two divisions respectively, to be paid out of the proceeds of the foreclosure sale, prior to any distribution of the proceeds among the mortgage bondholders. Kneeland, as the purchaser of both divisions, was ordered to pay the amount of the judgment into court within twenty days as a part of the purchase price upon the sale of the two divisions. It was also ordered that the amount of rentals due from the two divisions for the six months prior to August 1,

1883, be paid out of the net earnings, if any, of the receiver, but not out of the proceeds of the sale of the mortgaged premises until after payment of the mortgage indebtedness. Like orders were entered in the Circuit court of the United States for the Southern district of Ohio upon the report of Master Fishback, filed in the foreclosure cases in that court for the rentals due from the four divisions of the road in that jurisdiction, and the amounts so found due were paid by the purchasers of the four Ohio divisions respectively. To reverse this order the present appeal was taken by Kneeland. He is described in the prayer for the appeal at the foot of the decree (page 572), as "purchaser and trustee representing "the first-mortgage bondholders on said entire line of "railroad concerning both divisions from Toledo, Ohio, "to East St. Louis, Illinois." Appeals were also prayed by the owners of the equipment, but were never perfected. No appeal was ever prayed by the trustees, or by the Quigley committee of bondholders, who had been admitted as co-complainants in both foreclosure suits, or by any other parties.

BRIEF OF THE ARGUMENT.

I.

APPELLANT NOT ENTITLED TO APPEAL.

Sylvester H. Kneeland has no appealable interest in the matters here in controversy. He appears for the first time in the litigation as the purchaser of the two divisions

of the road under the foreclosure sales (pages 514, 519). That he purchased in his individual capacity, and not as a bondholder of either division, or as a trustee or committee for the bondholders, is apparent from the reports of the masters making the sale. They report concerning the sale of the Toledo division that they offered the property for sale, "and thereupon Sylvester H. Kneeland did bid "for said property the sum of six hundred thousand dol- "lars ($600,000)," (page 514). And that being the highest bid received, the property was "struck off and "sold to the said Sylvester H. Kneeland for the sum of "six hundred thousand dollars," (page 515). And in like manner they report the sale of the St. Louis division to Kneeland in his individual capacity, and not as a trustee or representative of the bondholders. (Page 519). He next appears in the record as joining in the exceptions to the report of Master Fishback on car rentals, of February 23, 1886, filed by the Quigley committee of bondholders, who had previously been joined as complainants in both foreclosure suits. (Pages 283, 286.) The exceptions recite (page 552), that they are filed by Quigley and his associates as committees representing the bondholders, and by the Central Trust Company, trustee in the mortgages, "and Sylvester H. Kneeland, purchaser "of said railroad and property, sold at foreclosure sale "under decrees rendered and entered in said above entitled "causes, and owner of and trustee for a vast majority of "said mortgage bonds." No proof was ever made of his ownership of bonds, or of his trusteeship in behalf of bondholders, nor was any allegation ever made of such interest by petition or other pleadings, the description of Kneeland in the exceptions being the only evidence of his interest as a bondholder. His next appearance upon the

record is at the foot of the final decree allowing the car rentals, where an appeal is prayed in the following language, (page 572): "To which decree the said Sylvester H. Kneeland, as purchaser and trustee representing the first mortgage bondholders on said entire line of railroad concerning both divisions from Toledo, Ohio, to East St. Louis, Illinois, now excepts and prays an appeal to the Supreme Court of the United States, which is granted, to operate as a supersedeas," etc. Aside from these recitals in the exceptions to the masters' reports and in the allowance of the appeal, the record is barren of any evidence showing the slightest interest in Kneeland, other than as a purchaser under the foreclosure sales.

It will hardly be pretended that a mere recital or description of this nature affords such evidence of the interest of Kneeland as a bondholder, or as a committee representing bondholders, as to entitle him to maintain the appeal. The trustees in the mortgages were already before the court by their bills for the foreclosure of the two mortgages in question, and were competent to act as the representatives of all bondholders, including Kneeland, if he were a bondholder, as to which there is not the slightest proof in the record. A mere recital in exceptions taken by parties to the record that such exceptions are also tendered by another party not appearing of record, or a recital in the final decree that the purchaser of the property appeals as a bondholder as well as purchaser, gives him no such standing of record as to warrant him in controlling the litigation, or in invoking the appellate jurisdiction of this court.

Even if Kneeland were a bondholder and interested as such in the final decree in controversy, of which there is no evidence, he should still have become a party to the

record by a petition and order of court before he was entitled to any voice in the litigation, or entitled to challenge the correctness of the final decree. So far, therefore, as he asserts a right of appeal in the capacity of a bondholder there is no proof before the court of his interest as such, nor was he ever made a party to the record in such manner as to give him any right to be heard, either in the Circuit court or in this court. Except as purchaser, a point to be hereafter considered he is a mere volunteer invoking the appellate jurisdiction of this court to revise a decree of the Circuit court with which the actual parties in interest and the actual parties to the record are content.

Especially is this true when, as in the case at bar, not only were the trustees in both mortgages actually before the court, but the bondholders themselves, through their committees selected for that purpose, had been, upon petition, joined as complainants in the foreclosure suits. November 10, 1884, James M. Quigley, James T. Harbeck and John McNab filed their petition in the suit for the foreclosure of the mortgage upon the Toledo division (page 268) as a committee and trustees of the first mortgage bondholders, praying that they be joined as co-complainants in that cause. Upon the same day James M. Quigley, Halsey J. Boardman and Charles W. Pierce, as a committee and trustees of the bondholders of the St. Louis Division, filed their petition (page 283) in the suit for the foreclosure of the mortgage upon that division, praying that they be joined as co-complainants in that suit. Exhibit A annexed to the first petition above mentioned (page 272) is an agreement between the mortgage bondholders of the two divisions in question whereby James M. Quigley, Halsey J. Boardman and Charles W. Pierce are made the trustees and purchasing committee

in behalf of the mortgage bondholders to purchase the St. Louis Division, and to procure its re-organization; and James M. Quigley, James T. Harbeck and John McNab are constituted a committee and trustees for the bondholders with like powers for the purchase and reorganization of the Toledo Division. An order was thereupon entered in each cause (pages 283, 286) granting the prayers of the two petitions and joining the respective committees as co-complainants in each of the causes respectively. These committees, although differing somewhat in the names of the persons composing them for the respective divisions, are for convenience spoken of in this brief and argument as the Quigley Committee, Mr. Quigley being a member of each of the two committees. They constantly appeared throughout the subsequent proceedings, filed amendments to pleadings, joined with the trustees in exceptions to masters' reports and generally shared with the trustees in the management of the two litigations. With the trustees and first-mortgage bondholders thus constantly before the court at every stage of the controversy, as formal parties to the record and as actual participants in the litigation, it is idle to assert that a mere volunteer who chooses to call himself a bondholder, without proof of his interest as such, can wrest the control of a litigation from the parties actually in interest, or appeal from a decree with which they are content.

Moreover, if there were any proof in the record of Kneeland's interest as a bondholder, and if he had been formally joined as a party to the cause, he could not maintain the appeal in his individual capacity as such bondholder without the joinder of the other bondholders in like interest with himself, and who were equally affected by the decree in question. The decree was, in effect, a joint decree

against all the mortgage bondholders giving priority in payment of car rentals over the mortgage bonds. The rule of this court requiring all parties jointly affected by a decree to unite in the appeal, or, on failure of some to join, requiring proceedings for a severance by the parties actually desiring to appeal, is so well se tled that citations of authority are needless. The rule is not a technical one, but rests upon two substantial reasons: first, that the successful party may be at liberty to proceed with the enforcement of his decree against those who do not question its correctness; second, that this court shall not be required to decide a second or third time the same question upon the same record. If, therefore, Kneeland had been a party to the record, which he was not, or a bondholder, of which there is no proof, it would still have been necessary that the other bondholders, represented by the Quigley committee, should have joined in the appeal, or that after due notice to them and an opportunity to join they should have declined, thereby entitling Kneeland to appeal individually. The rule itself, with the reasons underlying it and the practice in procuring a severanee are fully stated in *Masterson* v. *Herndon*, 10 Wallace, 416, and have been affirmed by repeated decisions of this court since that time.

It is not here denied that the Quigley committee, having produced their authority to act as a committee and as trustees for the mortgage bondholders, and having been formally joined as co-complainants in the suits, might have appealed from the decree. Such was the ruling of this court upon a similar question in *Williams* v. *Morgan*, 111 U. S., 684. That case was an action for the foreclosure of a railroad mortgage, in which Williams and Thompson presented to the court an agreement with the mortgage

bondholders, constituting them a purchasing committee, and by petition prayed leave to intervene and be heard before the master and the court as to the allowance of certain claims which were sought to be made a lien upon the property prior to the first mortgage. Their application was granted and they were formally admitted by an order of court, and thereafter were heard before the master, filed exceptions to his report and were heard before the court, and this court very properly sustained their right to appeal. The distinction between the status of appellants in that case and that of Kneeland in the case at bar is too obvious to require comment.

Kneeland thus having no appealable interest as an alleged bondholder, or as an alleged trustee in behalf of bondholders, the only remaining ground upon which his right to prosecute an appeal can be predicated is as a purchaser under the foreclosure sales of the two divisions. As has already been shown, he purchased both divisions in his individual capacity and not as a trustee or committee in behalf of the bondholders. Indeed the Quigley committee were the only committee designated by the bondholders to effect a purchase in their behalf or to represent them in the litigation. Kneeland therefore purchased as a stranger to the record, and, as any other stranger might have done, in his individual capacity and for cash.

It is confidently submitted that a purchaser at a foreclosure sale, who buys subject to liens or priorities which have been or may thereafter be established against the property sold, or who by the terms of the foreclosure decree, which is the origin and source of his title, covenants to pay all such claims, can not be heard to question their validity by appeal or otherwise. Kneeland was

such a purchaser. By the fourteenth clause of the decree of foreclosure against the Toledo division (page 469) the purchaser was required to pay from time to time in cash all amounts which might be decreed to be "payable up- "on court and receiver's indebtedness and to be prior "and superior to the lien of said first deed of trust and "mortgage; said payments to be made by the purchaser "or purchasers upon twenty days' notice by the masters "upon the order of the court to that effect entered."

The thirteenth clause of the decree of foreclosure against the Toledo division also contains the following provision (page 468): "The deed so executed and deliv- "ered by the masters shall contain an express stipula- "tion reserving to the court, and the court does hereby "reserve, full power and jurisdiction over said property, "with full authority and power, under default of the pur- "chaser or purchasers in complying with each and every "of the requirements of this decree respecting payment "of the purchase money, to take possession of said rail- "road and property and forthwith sell the same or any "part thereof upon order of the court to that effect en- "tered." Similar provisions are contained in the decree against the St. Louis division (page 479).

These decrees are the origin and source of Kneeland's title. He buys subject to their provisions, and by the very act of purchase in legal contemplation and effect he covenants with the court that he will promptly pay from time to time as the court may direct, in cash, as part of the purchase money, all claims which the court may adjudge to be prior to the first mortgage bond. The claims for car rentals now in issue are claims of this nature. They were expressly adjudged by the court to be prior to the lien of the mortgage bonds. Kneeland

had covenanted to pay them as part of the purchase money. To permit him now to assail their correctness by means of this appeal, when all other parties to the record, including the first-mortgage bondholders, represented through their trustees and through the Quigley committee, are content with the result, is to afford judicial sanction to his violation of the express conditions upon which his title was acquired.

Swann v. *Wright's Executor*, 110 U. S., 590, is an instructive case in point. The original action was for the foreclosure of a railroad mortgage, which was purchased by Wilder and McMillan. Swann succeeded to the rights of the purchasers by agreement, and with their assent he was reported to the court as purchaser, the sale was confirmed and a deed was executed to him accordingly. The decree of foreclosure, as in this case, provided that the sale should be subject to whatever claims might be decreed to be prior to the lien of the mortgage bonds. Certain claims for which receiver's certificates had been issued to one Wright were afterward adjudged by the court to be prior to the mortgage bonds, and their payment was decreed accordingly. Swann, as purchaser, filed a bill to set aside the allowance of these claims. The Circuit court dismissed the bill, and the decree was affirmed in this court. The opinion of this court is exceedingly instructive, not only as stating the true rule which should govern in this class of cases, but because it discloses a state of facts quite analogous to those in the case at bar. Mr. Justice HARLAN, delivering the opinion, says (page 598):

"The claim of appellant, as the purchaser of the property, to reopen the litigation, to which he was not a party, and which related to liens expressly subject to which the property was sold, purchased and conveyed, and which

liens were fully examined upon issues between, and notice to, those who, at the time the decree of sale was rendered, were alone interested in their recognition or rejection, does not seem to rest upon any foundation of justice or equity. We have seen that the original purpose of those promoting the foreclosure suit was to have the mortgaged property sold at an early day after the commencement of the litigation entirely free from incumbrance, leaving the court to provide out of the proceeds of sale for the expenses of the trust, and to make such distribution of the balance as was consistent with the rights of those having an interest in or liens upon the property. But this idea was abandoned at the instance of the bondholders, and the sale suspended in order to ascertain, if possible, before sale, the exact amount of all claims superior to the lien given by the mortgage. Among those alleged to be of that character were the claims presented originally by Wright and subsequently prosecuted by his executors. They were vigorously contested before Commissioners Burke and Phillips by those who were directly interested in defeating them, namely, the bondholders and their trustees. They received the approval of each of these commissioners; and while they were under examination by commissioner Gibbons, before whom that contest was renewed, the court feeling doubtless that the sale of the mortgaged property had been already deferred sufficiently long, made an order for its sale on a day named. That order materially modified the original decree. Instead of selling the property free of all incumbrances, so that the purchaser, as a condition of receiving a complete title, would only be required to pay the amount bid, the sale was ordered expressly subject, not simply to liens which had then (December 4, 1876), been established as prior and superior to the lien of the bondholders, but to all liens of that character which might be established on references theretofore ordered, and then pending. The claims of Wright were being pressed before the special commissioner as belonging to that class. The latter had before him all parties in interest, either in person or by representation. And his examination was being conducted under a reference previously made, and then pending. So that, as respects these claims, pur-

chasers were explicitly warned that they must buy the property, and take title thereto subject to their future allowance by the court. That warning was as distinct as if the claims had been specifically described in the decree by the name of the parties prosecuting them. Wilder and McClellan, therefore, purchased, and their assignee or vendee obtained the property, subject to a prior lien in favor of Wright's estate, if any such lien should be thereafter established on pending references. * * *

The property was sold with the possibility, present in the minds as well of the parties in the foreclosure suit, as of purchasers, that the latter would be required to take subject to a lien in behalf of Wright's estate; and, consequently, that to the extent of such lien the first mortgage bondholders would fail in having their demands satisfied out of the property. If, therefore, the appellant were granted the relief asked, the result—upon his theory of the respective rights of himself and the bondholders—would be not to benefit those who caused the property to be sold, but in effect, to give the amount of the Wright claims to Swann; or, if not to him, then indirectly to the company to which he has conveyed, and which must assert its rights whenever assailed under one who has taken title expressly subject to a lien in favor of those claims. * * * All that we decide is, that in view of the express terms of the decree of sale, and since neither the purchaser nor his grantee proposes to surrender the property to be resold for the benefit of those concerned, such purchaser has no standing in court for the purpose of re-litigating the liens expressly subject to which he bought and took title."

Nor can it be successfully contended that the provision in the decrees of foreclosure authorizing the purchaser, after payment of all claims adjudged to be prior to the first-mortgage bonds, to pay the residue of the purchase money in mortgage bonds and coupons, gives the purchaser an appealable interest. The record is barren of any evidence that Kneeland ever owned a solitary bond or coupon upon either division, or that he ever acquired or expected to acquire any such to be used as pur-

chase money under the foreclosure. Even if he had purchased such bonds to be used for this purpose, he would not thereby have become invested with the right of appeal, with which he was not otherwise clothed.

Upon this branch of the case *Stuart* v. *Gay*, 127 U. S., 518, is directly in point. That was a decree of foreclosure for the payment of certain liens which were, by the decree, classified as to priority in six different classes. By the decree the purchaser was required to pay ten per cent. of the purchase money in cash, the residue to be paid in five annual installments, the court retaining the title as further security for the payment of such installments, to be evidenced by the bonds of the purchaser with security. By the decree confirming the sale, the court reserved the right to make such orders as might be proper for the collection of the deferred installments of purchase money, and its distribution among the parties according to their respective interests. Stuart purchased at the foreclosure sale, and by a subsequent order of the court it was directed that he should be credited upon his bonds for unpaid purchase money with such of the various liens as he had purchased. Stuart actually became the purchaser of a large number of the liens awarded priority and thus became entitled to use such liens in payment of deferred installments of purchase money, just as Kneeland, by the decrees in this case, was authorized to use first-mortgage bonds. From a subsequent order of the court increasing allowances for interest upon certain of the prior liens, Stuart appealed to this court. The court held that he had no appealable interest as purchaser. Upon this point Mr. Justice MATTHEWS, delivering the opinion, says (page 529):

"It is evident, in the first place, that the cause of com-

plaint asserted by the appellant does not belong to him legitimately in his capacity as purchaser. The decree for sale rendered May 15, 1887, did not contemplate payment of the purchase money, otherwise than in money. It gave a credit running through a period of five years in equal annual installments, with interest on each. There was nothing in the decree which authorized the purchaser to assume that he would not be called upon to pay each installment as it fell due, in cash. As a purchaser, therefore, bound for the payment of specific sums at given dates, and who can not be compelled to pay more, and has no right to expect to pay less, it must be a matter of indifference how the proceeds of that sale shall be distributed among the creditors entitled thereto. The different modes of computing interest on the debts to be paid may affect relatively the creditors themselves, giving to one class more and to the other less, but it can make no difference in the amount of the fund to be distributed arising from the proceeds of the sale."

II.

NO OBJECTIONS TO THE MASTERS' REPORTS WERE TAKEN BEFORE THE MASTERS.

No objections to either of the reports of Special Master Cox or of Master Fishback, concerning car rentals, were taken before the masters, either by the trustees in the mortgage or by any of the mortgage bondholders, or by Kneeland as purchaser, or otherwise. The correctness of each of those reports was challenged for the first time by exceptions filed after the reports were returned into court. The rule is well established that exceptions to a master's report cannot be entertained when the parties excepting have failed to present their objections to the master before his report is returned into court, in

order that he may correct any errors to which his attention is thus called.

2 Harrison's Chancery Practice, 116.
2 Daniell's Chancery Practice, 1,302.
Vallence v. *Weldon*, 1 Dick., 290.
Ottey v. *Pensam*, 1 Hare, 322.
Story v. *Livingston*, 13 Pet., 359.
McMicken v. *Perin*, 18 How., 507.

The rule as thus stated was adopted by the English High Court of Chancery by a general order in chancery entered by Lord Keeper North, in 1683. (Beame's Orders in Chancery, 258.) Section 913 of the Revised Statutes of the United States provides that the procedure in equity in the circuit courts shall be according to the principles and usages of courts of equity, except when otherwise provided by statute or by rules of court, subject to alteration and addition by the courts accordingly, and to regulation by the Supreme court by rules prescribed from time to time, not inconsistent with the laws of the United States. The only rules which have been prescribed by the Supreme court touching exceptions to masters' reports are the 83d and 84th of the equity rules, the former of which allows a period of thirty days after the filing of the report within which either party may file exceptions, and the latter regulates the costs on the hearing of exceptions. Neither these, nor any other of the equity rules thus prescribed in any way affect, alter or impair the English rule, requiring objections to the report to be first taken before the master. That rule therefore stands precisely as it stood under the practice of the High Court of Chancery, and is part of the procedure in equity in the circuit courts under section 913 of the Re-

vised Statutes above cited. And none of the parties interested in resisting the allowance of the car rentals in question having objected before the masters to their findings, it is too late to question the correctness of those findings for the first time by exceptions to the masters' reports.

The rule is not a matter of mere technical procedure. It is founded in the obvious principle of the injustice to the court and to the opposing party, of permitting objections to be raised and discussed for the first time after the filing of the report, which might have been obviated, had the attention of the master been drawn to such objections before the filing of his report. This principle will be found to underlie all the authorities above cited in which the rule has been applied. Thus in 2 Daniell's Chancery Practice, 1302, the rule, with the reasons in its support, is stated as follows:

"The reason for the adoption of this proceeding, is thus stated by Lord Chief Baron Gilbert: 'The ancient rule was, that the party should never except, but where he had first objected to the draft of the report before the master, and, where there was no objection brought in, it was allowed as good cause to discharge the exception; and it were to be wished that this good rule was strictly followed, since, if the party had objected, he might have showed the master his error, and the report would have been altered in that particular, and never troubled the court. Whereas, it often happens that the party will conceal some material objection and keep it *in petto* from the master; and when this comes on by way of exception, it makes a variance in the report.'

"The rule mentioned by the Lord Chief Baron was promulgated by Lord Keeper North, in 1683, and is in fact, with little variation, the rule of the court at the present time; the practice of the court requiring that, as to all references to a master, of such a nature that his report thereupon is to be made the foundation of a further

decree or decretal order, no party is at liberty, without a special order, to except to the report, or present a petition in the nature of an exception thereto, unless he has previously to the master signing the report carried in objections, in writing, to the draft report, specifying the points in which he considers the report to be wrong."

In 2 Harrison's Chancery Practice, 116, the doctrine is stated as follows:

"After the master hath made his report either party may take exceptions to it, which must be argued in open court, but note: the party cannot regularly file exceptions to any report after the hearing, unless he first bring in objections to the draft of the report, to be heard before the master thereupon; otherwise such party gives the court unnecessary trouble and creates unnecessary expense to the other party in bringing exceptions to be determined by the court, which probably might have been determined before the master and allowed by him on arguing before him the objections to the draft of his report, and very great inconvenience may arise if this rule is not adhered to."

So in *Ottey* v. *Pensam*, 1 Hare, 322, Vice-Chancellor Wigram refused to hear a petition in the nature of exceptions to a master's report, because the objections had not been filed with the master before returning his report. The vice-chancellor states the rule and the reasons underlying it as follows (page 325):

"In principle, as I have already observed, there can be no doubt as to what the answer to this question ought to be, unless the objections which are required in the ordinary case are a useless form. But it is not so. The objections are in the nature of a plea. They inform the master of the point in respect to which his draft of the report is objected to, and they insure the same question only being brought before the court when the report is reviewed. Without this safeguard there would be constant confusion and uncertainty."

In *Vallence* v. *Weldon*, 1 Dick., 290, application was

made to take exceptions to a master's report, although no objections were filed with the master. Sir Thomas CLARKE, Master of the Rolls, says:

"It is a practice long established not to admit of exceptions after report and no objections taken to the report; *Jacobson* v. *Hawkins*, before Lord Hardwicke, see, and *Greegor* v. *Molesworth*, before Lord Hardwicke, see. But if the court sees reason to be dissatisfied, it may refer it to the master to review his report, and let the parties be at liberty to take objections to his report."

The rule was recognized, although not followed by this court, in *Story* v. *Livingston*, 13 Pet., 359. Upon this point Mr. Justice WAIN, delivering the opinion, says (page 366):

"Strictly, in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors or to reconsider his opinion. Dick., 103. A party neglecting to bring in objections can not afterwards except to the report, Harr. Ch., 479; unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report with liberty to the party to take objection to it. 1 Dick., 290; Madd., 340, 555."

And in *McMicken* v. *Perin*, 18 How., 507, the rule is again affirmed by this court, as follows (page 510):

"The appellant further objects that his debt was not accurately ascertained by the master upon the decree of reference. In *Story* v. *Livingston*, 13 Pet., 359, this court decided that no objections to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors, and to reconsider his opinion."

Nor can the rule be said to operate as a surprise upon or to work an injustice to any party to the record in a chancery cause, since, if the master's report is filed be-

fore he has had notice of its contents, or an opportunity to present his objections, it is still open to him to move a re-reference to the master to review his report, and to permit the filing of objections. This was the established practice in England, and is the practice which was pursued in *Vallence* v. *Weldon*, 1 Dick., 290, above quoted. And none of the parties interested in resisting the master's allowances for car rentals having seen fit to avail themselves of this practice, no reason is perceived why the case should be excepted from the operation of the general rule in behalf of appellant, who, by becoming a purchaser under the foreclosure decrees, requiring payment by the purchaser of all claims which should thereafter be allowed priority, contracted with the court to pay the demands now in question.

III.

THE ORDER OF JUNE 18, 1885, ESTABLISHING PRIORITY OF CAR RENTALS, NOT APPEALED FROM.

By the order of June 18, 1885, (page 434), the equities and priorities of appellees growing out of the use of their equipment by the receivers were finally adjudicated. By this order the amount of monthly rental for the equipment was fixed, and it was decreed that all rentals and repairs, as well as allowances for cars destroyed from August 1, 1883, the date of the appointment of Dwight as receiver, to January 1, 1885, after which the cars were returned to the owners, should be "a prior and paramount lien, to be "paid out of the net earnings, if any, of the receiver, or "if such earnings shall be insufficient thereto, then the "same shall be paid out of the proceeds of the foreclosure "sales of the mortgaged premises, prior to any distribu-"tion of such proceeds among the holders of the bonds

"secured by said mortgage." (Page 435.) By the same order the master was directed to compute the amounts due to the respective owners of the equipment upon the principles thus established. Appeals from this order were prayed by and allowed to various owners of equipment, but were never perfected. No appeal was ever taken from this order by Kneeland or by any of the parties in interest, the present appeal being only from the order of April 5, 1886, confirming the master's final computations. (Page 570.) Another order of February 8, 1886, (page 535), made some further modification in the instructions to the master with reference to the mode of stating the account, and reduced the monthly rentals fifteen per cent. This order, like that of June 18, 1885, was never appealed from by Kneeland, or by any other party interested in contesting the allowances for car rentals.

Upon this state of facts it is insisted that the rights and priorities of the equipment owners having been finally determined by the order of June 18, 1885, and there remaining only the mathematical computations by the master necessary to carry out that order, appellant is concluded as to all questions of which final disposition was made by the order of June 18, 1885. That order being a final determination of the principal contention which will be urged by appellant upon this appeal as to the priorities of the equipment owners over the mortgage bondholders, Kneeland, even if otherwise entitled to be heard here, should have appealed from that order. Having failed so to do, and his appeal being directed only to the order of April 5, 1886, the scope of the appeal is necessarily limited to the mathematical computations of the master in stating the account, which were all that remained to be done after the entry of the former order. In other words, the order

of June 18, 1885, having finally determined the right of appellees to priority in payment out of the proceeds of the foreclosure sale, the rate of monthly rentals and the percentage of their distribution among the different divisions, these questions are not open to review upon an appeal from a subsequent order. The scope of the present appeal is, therefore, necessarily limited to the mathematical computations of the master upon which the court entered the order of April 6, 1886, from which the appeal was taken. Every principle which was at issue between the contending parties was finally determined by the order of June 18, 1885. The cases, as to car rentals, were only retained after the entry of that order for the purpose of adjusting the accounts between the parties. As was said by this court in *Forgay* v. *Conrad*, 6 How., 201, upon a kindred question (page 204):

"In all other respects the whole of the matters brought into controversy, by the appeal, are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court, and the decree which is passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this court regulating proceedings in equity in the Circuit courts."

To the same effect are the following additional authorities, holding that a decree settling the rights of the parties is final and appealable, although a reference to a master may still be necessary to adjust their accounts in accordance with the principles of such decree.

Thomson v. *Dean*, 7 Wal., 342.

St. Louis, I. M. & S. R. Co. v. *Southern Express Co.*, 108 U. S., 24.

Winthrop Iron Co. v. *Meeker*, 109 U. S., 180.

IV.

THE RECEIVERSHIP CONTINUOUS FROM AUGUST 1, 1883, TO JANUARY 1, 1885.

The first receivership in this litigation, known as the Dwight receivership, had its origin in the creditors bill filed by Grenville D. Braman, August 1, 1883, upon which bill Dwight was appointed receiver upon the following day. November 27, 1883, the Dwight receivership was extended to the foreclosure case of the Central Trust Company against the Toledo Division, then pending. For convenience of computation, and by common consent of all parties in interest, the Dwight receivership is considered as having begun August 1, 1883, and as having been extended to the foreclosure case, December 1, 1883. Four months thus elapsed after the appointment of the receiver under the creditors bill before any formal order of appointment was made in the foreclosure case. By the decree of April, 1886, from which the present appeal is taken, the court treated the receivership as a continuous one, and allowed us priority of payment of car rentals from the date of the Dwight receivership, August 1, 1883, to January 1, 1885, after which last named date the rolling stock in question was returned to appellees. In his exceptions to the final report of the master concerning car rentals, upon which the decree of April 5, 1886, was entered, appellant took no exceptions to the allowance of rentals from December 1, 1883, to January 1, 1885, his only exception upon this point being to their allowance during the four months of the Dwight receivership. To previous reports of the

master, Kneeland had filed no exceptions. The exceptions of the trustees and of the Quigley bondholders to the various reports on car rentals, like Kneeland's exceptions to the final report, were limited to the allowance for the term of the Dwight receivership, no exception having ever been taken by any one to the allowance for the period from December 1, 1884. to January 1, 1885. And it will be contended by appellant that whatever may be the rights of appellees for rentals during the latter period, they are not entitled to recover for the term of the Dwight receivership.

That the receivership was a continuous one for the benefit of the mortgage bondholders throughout the entire period, and that it is to be treated as a unit in these proceedings, will be manifest from an inspection of the record. Braman filed his creditors bill August 1, 1883, alleging the history of the various consolidations, the mortgages upon the constituent divisions, the insolvency of the company and the necessity for the appointment of a receiver. To this bill, besides the consolidated railroad company, the Central Trust Company of New York, and Thomas A. Hendricks, as trustees in the mortgages, were joined as defendants. Upon the same day the railroad company and the Central Trust Company entered their appearance and waived service of process (page 12). August 2, 1883, the court appointed Dwight receiver (page 14). The order recites the appearance of the Central Trust Company by its solicitors, and the motion of complainant for the appointment of a receiver, and continues as follows:

"Upon consideration whereof, it is now by the court ordered, adjudged and decreed, said Toledo, Cincinnati and St. Louis Railway Company assenting thereto, and the said Central Trust Company of New York not

objecting thereto, that Edward E. Dwight be appointed temporarily receiver herein upon his giving bond", etc.

Upon the same day the record shows the appearance of Hendricks, co-trustee in one of the mortgages, as follows (page 16):

"Comes now Thomas A. Hendricks, trustee, one of the defendants in the above entitled cause by R. C. Bell, his solicitor, and waives the issue and service of process and enters his appearance herein, and does not object nor consent to the appointment of a receiver."

October 20, 1883, the Central Trust Company filed its bill for the foreclosure of the Toledo division mortgage (page 25), praying for the appointment of a receiver.

November 27, 1883, (page 72), an order was entered in the foreclosure case, reciting the filing of the Braman bill August 1, and the appointment of the receiver thereunder, and reciting the filing of the foreclosure bill October 20, praying the appointment of a receiver, and continuing as follows:

"Now, on motion of Thomas E. Stillman, solicitor for said Central Trust Company, it is ordered that the receivership already existing under the order heretofore entered, is hereby extended over and made to apply to the premises and property sought to be foreclosed in this action."

Upon the same day Dwight tendered his resignation as receiver, and on November 28, 1883, orders were entered in both of the suits (page 73) accepting the resignation of Dwight and appointing William J. Craig as receiver "in the place and stead of the said Edward E. Dwight."

It is thus shown that, so far from seeking a new or independent receivership under the foreclosure bill, the trustee merely sought and obtained a continuation of the existing receivership to that suit. Being already in court

as a party to the Braman suit; its appearance being formally entered before the appointment of Dwight as receiver in that suit; its solicitor appearing in its behalf upon a motion for the appointment of a receiver and not objecting to such appointment, and the same trustee afterward filing its bill for foreclosure a nd procuring the extension of the original receivership in that suit, it is too late to question the continuous existence of the receivership as one and indivisible from August 1, 1883, throughout the entire proceedings. It is true that neither the Central Trust Company as trustee in all the various mortgages, nor Hendricks, as trustee in the mortgage of the St. Louis division, expressly consented to the appointment of Dwight in the Braman suit. It is equally true that they did not object, the record reciting that they appeared and neither consented nor objected to such appointment. But the case was one where silence alone would give consent. Interest upon the mortgage bonds was long past due, and the trustees in the mortgages were entitled to immediate possession and to a foreclosure and the appointment of a receiver. The insolvency of the road and the necessity for such appointment were alleged in the Braman bill as well as in the subsequent foreclosure bills filed by the trustees against both divisions, and were conceded by all parties. The receivership therefore under the Braman bill was as much for the protection of the bondholders as for the judgment creditor who filed that bill. It was not a receivership for the benefit of any one creditor or class of creditors, but for the benefit of all, as their interests might appear. The court in appointing Dwight as receiver took possession and control of the property for the benefit of all parties in interest. That the Dwight receivership was so understood by the bondholders and by their trustee is apparent from the

fact that when the trustee moved for the appointment of a receiver in its foreclosure case, November 27, 1883, its motion was not for the appointment of a new and independent receiver, but for the extension of the former receivership to the foreclosure case, and the motion was granted as prayed. The bondholders having received the full benefit of, and protection afforded by the receivership in the Braman suit, and by its extension to the foreclosure suit, they cannot now escape its burdens by seeking to divorce the receivership in the latter case from that in the former.

Judicial authority would scarcely seem necessary in support of so plain a proposition. But two decisions of this court upon analogous questions are so directly in point that they may be properly quoted here. In *Miltenberger* v. *Logansport R. Co.*, 106 U. S., 286, the receiver was appointed August 26, 1874, upon a bill for the foreclosure of a second mortgage, to which the trustee in the first mortgage was not made a party, and of which it had no notice until after the appointment. The receiver thus appointed continued to operate the property and incurred large obligations. More than a year elapsed before the filing of a cross-bill by the bondholders under the first mortgage for the foreclosure of that mortgage. No receiver was ever appointed upon the application of the first-mortgage bondholders and no extension was had of the original receivership to their cross-bill. Nevertheless, this court, affirming the judgment of the Circuit court, treated the receivership as for the benefit of the first-mortgage bondholders, and awarded priority to a large amount of claims for receiver's indebtedness over the first-mortgage bonds. Upon this point this court say (page 307):

"Moreover, the cross-bill was not filed for more than

a year after the receiver had been appointed, and it was in judgment of law, or in fact, fully known all the time to the first-mortgage bondholders what was being done by the receiver in creating the claims now sought to be disputed. Nor was it filed for more than a year after the first mortgagee had appeared and answered in the original suit. It was at all times competent for the first-mortgage trustee, as a party to that suit, to have asked the court to protect the interests of the bondholders in case the receiver was disregarding them; and the cross-bill could as well have been filed earlier as later by the plaintiffs in it, or by other bondholders."

In *Union Trust Co.* v. *Illinois Midland R. Co.*, 117 U. S., 434, the same doctrine was reaffirmed. In this case the receiver was appointed in September, 1885, upon a bill filed by stockholders and judgment creditors. It was not until December, 1886, that any foreclosure proceedings were instituted. A bill was then filed for the foreclosure of a mortgage upon one of the three constituent divisions of the consolidated road, and similar bills for the foreclosure of mortgages upon the other divisions followed at later dates. No receiver was ever appointed in the foreclosure suits, but these suits were, after the removal of all the litigations to the Federal court, consolidated with the original creditors bill. Large allowances for indebtedness incurred by the receiver thus appointed, both before and after the filing of the bills for foreclosure, were given priority to the first-mortgage bonds by the judgment of the Circuit court, which was affirmed by this court. In that case, also, as in this, it was sought to defeat the preference thus given to receiver's indebtedness over mortgage bonds by the fact that the receiver was not appointed with the consent of the bondholders or at their instance. Upon this point, this court say (page 463):

"It does not at all comport with the principles of equity for the bondholders now to insist that the want of affirmative consent by them, or their trustee, could paralyze the arm of the court in the discharge of its duty. The want of that aid which it was the duty of the trustee and the bondholders to give to the court in discharging its responsible functions, with the road openly in charge of the receiver and being run by him, and his acts plain to view, and the interest on the bonds in arrear, cannot be urged to a court of equity as a ground for denying its power to do what was thought by it best for the interests of all concerned, including even those who thus willfully stood aloof."

And in the same case, to the objection that indebtedness incurred under such a receivership, having its origin in a creditors bill, should not be made prior to the claims of mortgage bondholders, this court, after quoting, with approval, *Wallace* v. *Loomis*, 97 U. S., 246, and *Miltenberger* v. *Logansport R. Co.*, 106 U. S., 186, use the following language (page 458):

"In this connection it is objected that in those cases the suits were foreclosure suits brought by trustees, under mortgages, and that a different rule should obtain in a case where the trustees or the bondholders do not come into court initially, asking the aid of equity in the appointment of a receiver. It is said that the Hervey suit was not such a suit. But the complainants, with Hervey, were judgment creditors of the Paris and Decatur Company, with executions returned unsatisfied. The bill set up the precarious condition of all the property held and used by the Illinois Midland Company, and the necessity for a receiver in the interest of all the creditors of all four of the corporations, to prevent the levy of executions on such property; and it prayed for a judicial ascertainment and marshaling of all the debts of all the corporations, and their payment and adjustment as the respective rights and interests of the creditors might appear and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill

was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits."

V.

CAR RENTALS DURING THE RECEIVERSHIP ENTITLED TO PRIORITY OVER MORTGAGE INDEBTEDNESS.

If the suggestions already made under the first head of this argument are well founded, appellant has no appealable interest and cannot be heard to question the allowance of car rentals, since he purchased the property expressly subject to such priorities as might be thereafter awarded by the court. If, however, notwithstanding appellant purchased subject to such priorities, which, by the terms of the decrees of foreclosure, he agreed to pay as part of the purchase money, the court shall still hold that he has an appealable interest, and may question the allowance of such priorities, it still follows that, if the views expressed under the third head of the preceding argument are well taken, he cannot now object to these allowances, since he failed to present his objections to the master before the filing of his report. But if the court shall still be of opinion that he may now be heard to challenge the correctness of the decree, because of his having excepted to the report of the master, he can only be heard as to such matters as were embraced within those exceptions. As has been already stated in the preceding pages, no exception was taken to the allowance of car rentals during the period from December 1, 1883, to January 1, 1885, the only exception upon this point

being as to the payment of rentals during the Dwight receivership, from August 1, 1883, to December 1, 1883. Indeed, as appears throughout the entire record, the right of appellees to recover rentals from the date of the extension of the receivership under the Braman bill to the foreclosure suit was substantially conceded throughout the litigation in the court below. The sole contention upon the part of the bondholders in that court was to prevent the allowance of rentals during the Dwight receivership, and for six months prior thereto, and to reduce the allowance as far as possible for the use of the cars after the extension of the receivership to the foreclosure cases.

It is an elementary rule in chancery procedure, which has been repeatedly affirmed by this court, that a party appealing from a decree in equity, founded upon a master's report, cannot be heard in this court to question the findings of the master upon any points which were not embraced in or covered by his exceptions to the master's report. This rule has been so repeatedly affirmed by this court that an extended citation of authorities is unnecessary. We content ourselves with a reference to two cases in which the rule has, perhaps, been more clearly announced than in many other cases in which it has been applied.

Kinsman v. *Parkhurst*, 18 How., 289, was an appeal from a decree awarding certain damages upon a bill in equity for the infringement of letters patent, the decree being based upon a master's report fixing the amount of damages. Upon the point under consideration, the court say (page 294):

"The appellant, Goddard, objects that he has been charged by the final decree, jointly with Kinsman, for the

profits on sales of machines made before the transfer to him by Kinsman. If this be so, it arises from the report of the master, who was directed by the interlocutory decree to report the sales made by Kinsman and Goddard, or either of them, and the advances and expenditures of them, or either of them. If his report was in this or any other particular erroneous, it was incumbent on the defendants to have pointed out the error by an exception filed pursuant to the rules of the court on that subject. But no exception was filed, the report was confirmed, and the final decree was drawn up and entered without objection by the appellant, Goddard, reciting that it appears by the report of the master that the sum of $23,220.28 is due and owing by Kinsman and Goddard to Parkhurst, and thereupon proceeds to decree them to pay that sum. When a motion to dismiss the appeal was made at a former day on the ground that the master's report not having been excepted to, and the appellants not having objected to the final decree, there was nothing open on this appeal, the appellant's counsel declared that the appeal was designed only to review the interlocutory decree which had decided the merits of the cause, and that unless error was found therein, there was no ground for the appeal. The motion to dismiss the appeal was overruled, the court being of opinion that it was open to the appellant to review the decision made by the interlocutory decree. But the interlocutory decree does not direct the master to charge Goddard and Kinsman jointly with profits on sales made by Kinsman alone. If the master put such an interpretation on the decree, it was an erroneous interpretation, and should have been brought before the court below by an exception. It is too late to object to it here, for the first time."

The Vanderbilt, 6 Wal., 225, was an appeal from a decree in admiralty, where, after a finding in favor of libelant, the cause was referred to a commissioner to ascertain the amount of damages. No exceptions were filed to the report of the commissioner, which was confirmed by the court and a final decree entered in accordance with the report. Upon appeal to this court it was

sought to question the amount of damages which had been found by the commissioner and awarded by the District court. This court refused to entertain such objections. Mr. Justice Clifford, delivering the opinion, says (page 230):

"Objection is made to the amount of the damages awarded, but the objection can not prevail, as no exceptions were taken to the commissioner's report in the District court. Such objections will not be entertained in this court, unless the complainant gave notice of the same in the court below by appropriate exceptions to the commissioner's report. Parties should present their objections at the stage of the litigation when the errors, if any, may be corrected, without inconvenience and unnecessary expense; and if they fail to do so without just excuse, they must be understood as having acquiesced in the decision of the court."

In accordance with this rule it only remains to consider the correctness of the decree of the Circuit court in allowing priority of payment to appellees during the period of the Dwight receivership. But if the court shall still regard appellant as entitled to review the action of the Circuit court in awarding priority to appellees from December 1, 1883, to January 1, 1885, notwithstanding his failure to except to such allowance in the court below, the following suggestions will be equally applicable to the entire period from the appointment of Dwight as receiver under the Braman bill, August 1, 1883, to the surrender of the equipment, January 1, 1885.

It is confidently asserted that in all of the many railroad foreclosures which have been reviewed by this court no stronger equities have been presented for the allowance of car rentals during the receivership in preference to mortgage indebtedness, than in the case at bar. Substantially all of the rolling stock in use upon the road at

the date of the appointment of the receiver and during the entire term of the receivership, was held under the car-trust leases in controversy. Whatever earning capacity the road possessed, either before or after the appointment of the receiver, was due almost entirely to the use of this rolling stock. The road being a narrow-gauge system, it was necessary that its equipment should be specially made for its use. The undisputed proof before special Master Cox, showed that the equipment embraced in the leases in question was made upon specifications furnished by the master mechanic of the road to meet its peculiar construction and demands. The contracts were let upon close competition among various manufacturers throughout the country, thus securing the lowest market price. It was not even pretended in the court below that there was any fraud or unfair dealing in the execution of the original car-trust leases, or that the rentals thereby fixed, which, if promptly paid, were to be the purchase price of the equipment, were unreasonable. The claims for car rentals were passed upon by three different masters. The fullest opportunity for scrutiny and investigation by the bondholders was allowed at every stage of the litigation. The entire history of the car trusts was fully presented in the testimony taken before the various masters, especially before Master Cox. Counsel for the bondholders were present at every stage of the investigation. Repeated hearings were had before the court upon every question of law and of fact in controversy between the parties. Every presumption must, therefore, be indulged in supporty of a judgment thus rendered as the result of an unusually protracted and closely contested litigation.

It is also to be remembered that the continuous use of

this equipment by the receiver was an absolute necessity to keep the road in operation as a going concern. Upon these points the conclusions expressed by Special Master Cox in his report as to the situation at the beginning of the receivership have never been and cannot be successfully questioned upon this record. He says (page 212):

"That the former (owners of the equipment) could not have found a market for this rolling stock if thrown upon the market, as a consequence of the failure of this narrow-gauge system, and that the latter (the receiver) could not have found other similar rolling stock to take its place, if deprived of it. He finds, therefore, that the property being in the hands of the court, it is equitable and fair that, pending the final disposition of the causes, neither party should take advantage of the supposed necessity of the other, but that justice will be done if the rental during the receivership be fixed at what would be an ordinary renting price of engines and cars of similar cost upon standard-gauge roads."

That the rental allowed by special Master Cox was a fair and reasonable rental is equally clear. It was based largely upon the testimony of Mr. Hegewisch, president of the United States Rolling Stock Company, whose fairness, although a party in interest, was not questioned, and who testified from a large experience in the actual rental of rolling stock (pages 746–752). No effort was made before the master to discredit this testimony, and scarcely any attempt was made in behalf of the bondholders to prove a less rental value. It is true that in the exceptions to the masters' reports, it was objected that rentals had been allowed upon the basis of the monthly rental value of the cars rather than upon the actual mileage made, and the same contention will probably be made by appellant in this court. Upon this point

it is sufficient to say that no proof was offered in behalf of the trustees or bondholders before the master as to rental value based upon mileage, nor was any proof offered of the mileage actually made by the cars in question. The case proceeded through all the hearings before the various masters upon the basis of monthly rentals instead of mileage. Even if it were competent for appellant in this court to insist upon the mileage basis as the proper basis for computing rentals, no data have been furnished, and there is no proof in the record upon which such a computation can be made.

Notwithstanding the monthly rentals originally allowed by Special Master Cox were in themselves reasonable, and were based upon the only competent testimony in the record of any witnesses familiar with such questions, who testified from actual transactions in the current course of business, these rentals were largely reduced by the court. By the order of June 18, 1885, an average reduction of thirty-five per cent. was made in the monthly rentals of the various classes of equipment from the figures reported by Special Master Cox. Again, by its order of February 8, 1886, the court of its own volition, and without the request of the bondholders, made a further horizontal reduction of fifteen per cent. upon the amount of the rentals as already reduced by its previous order (page 536). And it is for the modest pittance thus allowed us by the court after an arbitrary reduction of fifty per cent. upon the rentals as originally found, that we are forced to a long and vexatious litigation.

It is here to be noted, also, that no question was ever raised before either of the masters upon any of the hearings as to the necessity for the continued use by the receiver of all the rolling stock in controversy. No proof

was ever offered before the masters tending even remotely to show that the rolling stock was in excess of the necessities of the road. Upon the contrary, it was shown by the testimony of Receiver Craig that the continuous use of all the rolling stock upon the entire system, nineteen-twentieths of which were embraced in the car-trust leases, was a necessity for the maintenance of the system. Upon this point Mr. Craig testifies as follows (page 610):

"I have operated the system as an entirety, under the various orders in the causes in which I was appointed receiver. When I took possession of the road I continued in use the rolling stock, consisting of locomotives and cars of all descriptions. I made no new disposition of any part of this, but used it according to my discretion as necessary in the business of the road. I have continued so to use it to this time, including the rolling stock taken from lessors, as well as that owned by the road.

"The rolling stock has been used by me wherever it was most needed, without confining it to any divisions of the road separately. I now mean the rolling stock independent of locomotives. I have not paid any attention to the divisions into constituent parts in operating. I could not do so in practical working of the road. I did not inquire whether any constituent road had leased the cars, but used all where needed, so that the same cars could go in trains over the whole road without change.

"There has been use for all the rolling stock. There is, such as it is, about twenty-five per cent. of our locomotives do very little work—are not able to—but I could get seventy-five new locomotives that would do all the work of the hundred we have. Taking it the year round, I would say I have use for all the rolling stock, it being, as I have indicated, from 1st July to March first, makes the busy part of the year. The business is principally coal, grain and wood products, including lumber, staves, saw-logs, etc. I think prudent railroad management would require the use of all this rolling stock for the business of the road."

The sole question, therefore, upon this branch of the case, is whether a receiver appointed in a proceeding for the foreclosure of a railway mortgage may be permitted to use, without objection upon the part of the mortgage bondholders, rolling stock which is indispensable to the operation of the road, and without which its operation would be paralyzed, without compensation to the owners of such equipment. Our contention upon this branch of the case is, that the use of our cars by the receiver was a legitimate and necessary use in the discharge of his functions to preserve the property as an entirety; to continue the operations of the road as a going concern; to preserve its franchise and enable it to discharge its duty to the public; and that obligations thus incurred are a necessary and legitimate expense of the receivership, and, like all other expenses, to be paid out of the earnings of the receiver, if sufficient, or out of the corpus of the mortgaged estate. In this respect the car rentals in question stand precisely upon the same footing as any other of the expenses of the receivership, or the cost of administering the trust estate. It is a fundamental principle of equity that in administering trust estates, whether through the agency of a receiver, of an assignee, or of a trustee under an express trust all expenses of the trust are to be paid in full, either out of the income of the estate, or, if the income is insufficient, from the proceeds of its sale. It is not perceived that any reason exists why the case of a railroad receivership should in this respect be governed by different principles from those which prevail in the management of all other classes of trusts for the benefit of creditors. As applied to the receivership of a railway, the principle for which we contend is that the road is managed and operated by an officer of and under the im-

mediate direction of the court, for the benefit of the mortgage bondholders; that the continuous operation of the road and of its franchises is necessary for their preservation and maintenance, not only for the protection of the real owners, the mortgage bondholders, but to enable the road to discharge its duty to the public as a common carrier; that indebtedness thus contracted by a receiver in the execution of a trust delegated to him by the court is an indebtedness of the court itself; that courts of equity should pay their own indebtedness, whatever may be the views of mortgage bondholders upon the sanctity of such obligations; and that while the primary fund for the payment of such indebtedness is the income accruing from the operation of the road, yet, after exhausting that fund, such indebtedness is an equitable charge upon the road itself, to be paid, if necessary, out of the proceeds of the foreclosure sale, before any distribution thereof among the mortgage bondholders.

It will doubtless be contended here, by counsel for appellant, as it was contended upon the final hearing in the court below, that the rule of priority, as above stated, is to be applied only in cases where there has been a diversion of current income from the payment of current indebtedness, and for the betterment or improvement of the mortgaged property for the benefit of the bondholders. And upon this point *Fosdick* v. *Schall*, 99 U. S., 235, will be cited.

Even if the doctrine of diversion, as announced in *Fosdick* v. *Schall*, has any application to the case at bar, abundant proof is shown in the record of a sufficient diversion of earnings to justify the allowance of most of the car rentals now in question. In his petition filed May 1, 1884 (page 129), Receiver Craig reports to the court

that $120,000 have been paid from the earnings of the receivership upon arrears of wages, and "on debts the "payment of which was imperative for the preservation "of the property." And it is further stated in the petition (page 130) that the demands for the payment of which the earnings of the receivership were thus diverted, "have been imperative for the preservation of the prop-"erties in his possession, which were not connected with "the operation of such road."

May 5, 1884, the court entered an order upon this petition (page 131), reciting that: "It appearing to the "court from the accounts of said receiver filed in court "that large sums of money had been paid from the re-"ceipts of said road while it had been in the possession of "the receiver, upon the debts of said company incurred "prior to the appointment of said receiver, and that other "moneys have been paid where necessary for the preser-"vation of said property which are not chargeable to "operating expenses"; the court, therefore, authorizes the receiver to borrow $150,000 upon receiver's certificates, to be used in payment of operating expenses and labor claims. Here is unchallenged proof of the diversion of $120,000 of current income of the receivership in payment of obligations incurred prior to the appointment of a receiver, and for the management and preservation of the property other than for operating expenses. If, therefore, diversion of receiver's income were to be made the test for the allowance of receiver's indebtedness, and if this court so held in *Fosdick* v. *Schall*, we have still brought the case within that rule by showing such diversion.

It will doubtless be insisted by counsel for appellant that no diversion of current income was made during the

receivership, and that there were no net earnings during this period. This contention will be based upon a report of Special Masters W. P. Fishback and A. J. Ricks, filed March 10, 1887. This report was not embraced in or printed with the original transcript of the record. We have, however, at the request of counsel for appellant, stipulated that it may be filed with and constitute a part of the original transcript, reserving all objections as to its competency, relevancy or materiality. These objections are based upon the fact that the report is not a part of the record in these cases, but is entitled in and forms a part of the record in certain suits pending against the railway company in the United States Circuit court for the Southern district of Ohio. It is, therefore, a document wholly foreign to this litigation, being a report to another court in other and different suits. It is true that the masters in this report do find that there was no diversion of earnings during the period beginning six months prior to the Dwight receivership and ending August 1, 1884, and that there were no net earnings, but that there was a large deficit for this period. The report is silent as to the earnings of the road from August 1, 1884, to January 1, 1885, being a part of the period for which car rentals were allowed us by the court below. It is to be observed also that this report was made nearly a year after the final judgment of the Circuit court allowing our demands and the appeal therefrom, and after we were out of court. It was made without notice to us and with no opportunity to be heard or to question the conclusions of the masters. The report is not based upon the testimony of any witnesses, but purports to be the result of an examination made by the masters themselves, and the conclusions are based upon their own investiga-

tion, they having acted in the two-fold capacity of witnesses and of masters. It is inconceivable that such an *ex parte* finding, made in other litigations pending in another forum, with no opportunity for investigation or cross-examination upon our part, can be admitted to impair our rights in this litigation or to contradict the order of the Circuit court of May 4, 1884, above quoted, finding a diversion of one hundred and twenty thousand dollars from the earnings of the receivership.

But it is confidently submitted that *Fosdick* v. *Schall* has no application to this case. The question there was, not as to priority of payment of indebtedness incurred by the receiver in that case, but as to priority for car rentals during a former receivership in another case, and for six months antedating such former receivership. In that case Osgood, a mortgage bondholder of the Chicago, Danville and Vincennes Railroad Company, filed in a State court a bill for foreclosure and for the appointment of receivers, and the cause was afterward removed to the United States Circuit court for the Northern district of Illinois. After such removal Fosdick and Fisk as trustees in the railway mortgages filed their own bill in the United States Circuit court for the foreclosure of their mortgages. Upon this bill Anderson was appointed receiver, the appointment being an original one, having reference only to that suit and having no connection with the prior appointment of Hammond and Brown in the Osgood suit. In other words, a new and independent receivership was instituted in the Fosdick suit by an original order of appointment, instead of the extension of the existing receivership in the Osgood suit to the Fosdick case. Anderson thereupon took possession of and operated the road under his original appointment in the Fosdick suit, while the

former receivers, Hammond and Brown, appointed in the Osgood suit, filed their final accounts and were discharged. Schall had sold certain cars to the railroad company under a condititional contract of sale, substantially analogous to the present car-trust leases. Hammond and Brown, the receivers in the Osgood suit, used these cars during their receivership, and Anderson continued their use during his receivership in the Fosdick case. Anderson made a new contract with Schall for the payment of $7 a month as rental for each car. It was expressly admitted by Schall, in his petition of intervention, that he had been paid this rental in full during all the time the cars were in use by Receiver Anderson. (See *Fosdick* v. *Schall*, 99 U. S. 239, 240.) No claim, therefore, was made for the use of the cars during the Anderson receivership in the Fosdick case, the only claim being for rental prior to that receivership, a part of which had been incurred during the receivership in another and independent cause, and a part incurred by the company prior to any receivership. The Circuit court allowed Schall $9,450 as rental for the cars for six months prior to the receivership in the Osgood case and $5,118.75 for rental at the same rate of $7 per month for the use of the cars by Hammond and Brown, the receivers of the state court in the Osgood case, and the amounts thus allowed were decreed to be paid out of the fund in court. No question, therefore, was involved in *Fosdick* v. *Schall* as to priority of car rentals while the road was operated by the receiver in that case, but only as to such priority for the use of the cars by receivers in another litigation, in a different forum, having no connection with the Fosdick suit, and for their use by the railway company prior to any receivership. And were we

now demanding at the hands of the court that the rentals for the use of our equipment for six months preceding the receivership in this case should be paid in preference to the lien of the mortgage bondholders, *Fosdick* v. *Schall* would apply. Indeed the Circuit court recognized the distinction, and in conformity with *Fosdick* v. *Schall*, by its decree of April 5, 1886, from which the appeal is taken, expressly limited our right to recover rentals for six months preceding the Dwight receivership to the net income of the receiver as their source of payment. For the rentals during the period of the receivership the court treated the obligation as a part of the ordinary expenses incurred by the receiver in the management of the trust, and made them payable out of the proceeds of sale, in default of the receiver's net income being sufficient. So far from this decree being inconsistent with *Fosdick* v. *Schall*, it is in perfect harmony with the ruling of this court in that case. And we are now only contending that the language of the court in that case shall be limited to the facts of that case, viz.: an effort to give priority to car rentals incurred prior to the appointment of the receiver. And that this court did not there intend to affirm any general rule which should govern, in future cases, regardless of circumstances, is apparent from the opinion, at page 254, where the court say:

"No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act."

Indeed it is apparent throughout the entire opinion that the court had in mind only the case then before it of an effort to obtain priority of obligations incurred prior to the receivership, and that the diversion which was made

the test of such payment was a diversion by the company before the appointment of a receiver. This is apparent from the language of the learned Chief Justice at page 253, where he says:

"* * * The officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may upon an adjustment of the accounts so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights."

That the rule in *Fosdick* v. *Schall* was only intended to govern in adjusting the priorities of creditors of the railway company before the appointment of a receiver is also manifest from the judgment of this court in *Hale* v. *Frost*, 99 U. S., 389, decided at the same term. In that case this court awarded priority of payment as against mortgage bondholders to the claim of the Union Car Spring Manufacturing Company for car springs and spirals furnished to the railway company before the receivership, and the claim of Hale, Ayer & Company, for supplies furnished to the machinery department before the receivership, and the opinion of the court is based expressly on *Fosdick* v. *Schall*, which is cited as the controlling authority in that class of cases.

So in *Union Trust Company* v. *Souther*, 107 U. S., 591, this court affirmed a decree of the Circuit court awarding priority of payment out of the net earnings of the receivership to a claim for supplies which had been furnished to the company before the appointment of the receiver, upon the ground of a diversion of current income by the receiver for the betterment of the property. And *Fosdick* v. *Schall* was again relied upon as the authority for so doing.

Again, in *Burnham* v. *Bowen*, 111 U. S., 776, this court, still following and citing *Fosdick* v. *Schall*, adjudged priority in favor of a coal company for coal furnished to a railroad before it passed into the hands of a receiver, there having been a diversion by the receiver of current income for the benefit of bondholders. In all these subsequent cases, therefore, this court has reiteratedly placed its own construction upon its opinion in *Fosdick* v. *Schall*, as an authority, not for the payment of receivers' indebtedness out of receivers' income or out of the corpus of the estate, a diversion of current income being shown, but as an authority for the payment of indebtedness of the railway company prior to the receivership upon the ground of such diversion.

It is therefore submitted with confidence that, while *Fosdick* v. *Schall* remains the controlling authority which has ever since been followed by this court in determining priorities between mortgage bondholders and creditors of a railway company for demands accruing before the appointment of a receiver, it was never intended to and does not control as to the payment of indebtedness incurred by a receiver in the management of his trust. The rule of this court in the latter class of cases is the rule which has always governed in the English chancery practice and in courts of equity in this country, viz: that the court having taken possession of a trust fund or estate for the benefit of creditors must charge against that fund or estate, or against the proceeds of sale if necessary, all indebtedness incurred *pendente lite* in the management of the trust. The rule was applied by this court in *Myer* v. *Car Company*, 102 U. S., 1, to a case closely analogous in its facts to the case at bar. In that case rolling stock was held by the railroad company under a contract of con-

ditional sale coresponding to the car-trust leases here. A receiver was appointed in a suit for the foreclosure of a mortgage upon the railway, and as in this case he took possession of and used the cars in question. The Circuit court directed payment by the receiver in full of a reasonable rental for the use of the cars during the receivership, wholly independent of any question of diversion. As to the obligation of the court to thus pay its own indebtedness in full, Mr. Chief Justice Waite, delivering the opinion, says (page 113):

"There can be no doubt that it is the duty of a court to pay from the trust fund it has in possession, all the debts it incurred in its judicial capacity while administering the trust assumed, pending the litigation in behalf of the litigating parties."

The doctrine of *Fosdick* v. *Schall*, therefore, goes no farther than to assert that a diversion of current income by the officers of a railway company to the prejudice of current creditors will warrant the court, after taking possession through its receiver, in applying the income of the receivership to the payment of indebtedness of the company having its origin prior to the receivership. And to assert that this court there intended to make diversion of income the sole condition upon which receiver's indebtedness should be given priority of payment out of a mortgaged estate, is to assert a proposition not only wholly unwarranted by the facts in that case and by the opinion, but repugnant to the ordinary principles which govern courts of equity in the discharge of obligations incurred in the management of a trust through the agency of a receiver. Nor, if this test is to be applied, can any distinction be drawn either in law or in morals between obligations of a receiver for the rent of rolling stock, and obligations for labor, material or supplies of any and every

nature. The rights of appellees in this case as the owners of equipment used by the receiver are precisely the same as the rights of employes and laborers in the service of the receiver, or of materialmen who may have furnished him with material and supplies for the operation of the road. Appellees' rights are no greater than those of the various classes of creditors here enumerated; in the nature of things they can be no less. To assert that the laborer who gives his time and labor to the receiver, or that the materialman who supplies him with coal or oil, or other supplies, used in the daily operation of the road, shall be paid in full, as was done in this case and as has always been done in such cases, while the owner of cars used by the receiver shall be paid only upon proof of a diversion of income, is to assert a proposition so revolting that it can never meet with judicial sanction. In every railroad foreclosure which has been reviewed by this court claims for labor, material and supplies furnished to the receiver in the operation of the road have uniformly been allowed priority of payment as against the bondholders, and such judgments have been uniformly confirmed by this court. As to receiver's indebtedness proper, it is believed that no case can be found in the reports of this court or of the Circuit courts in which the current obligations of the receiver and of the court in the management of the trust have ever been dishonored or repudiated. It has been left to appellant, in this case, to assert for the first time that a distinction should be drawn between the various other classes of receiver's creditors who are uniformly paid in full, and the unfortunate owners of rolling stock.

If a court of equity, administering the affairs of an insolvent railroad through the agency of a receiver, were

a species of kindergarten or a modern school of political economy, such a proposition might receive some countenance and support. But to assert that a court administering a trust estate is to give preference to labor over capital in satisfaction of obligations accruing to either from the trustees of such estate, is to assert a species of sentimental equity which has never yet been countenanced by this court. The record discloses that laborers and employes of the receiver were paid in full, and the propriety of such payment was never questioned by appellant or by any of the mortgage bondholders. And the court by its decree of April 5, 1886, concerning car rentals, merely applied the same rule to the owners of equipment that had been applied to employes, laborers, and materialmen, viz: the allowance of compensation for labor or material furnished to the receiver, to be paid before distribution among the mortgage bondholders. To refuse the same measure of relief to the owners of these cars which was given to the employes of the receiver, and to assert that the manufacturer who furnishes rolling stock shall be deferred, while the laborer shall be preferred in payment, is a species of communism or socialism which has never yet found judicial sanction.

That the doctrine of diversion announced in *Fosdick* v. *Schall* was never intended to apply to cases of receiver's indebtedness, or to be the sole test of the payment of such indebtedness in preference to the claims of bondholders, is also apparent from later cases in which such priorities have been allowed wholly irrespective of any question of diversion.

Miltenberger v. *Logansport R. Co.*, 106 U. S., 286, is a notable instance of this character. In that case large

obligations had been incurred by the receiver in the adjustment of liens upon and rental of rolling stock held under conditional sales or leases, as well as for the use of a line of railroad held under a lease to the company, over which the receiver was appointed, the use of which leased line was continued by him. All these claims were allowed priority in the Circuit court, and its decree in that respect was affirmed on appeal. Considerable amounts for ticket and freight balances due to connecting lines of railroad prior to the receivership were also given priority, as well as expenditures in the completion of a part of the road and in the construction of a bridge. To render the case still more analogous, if possible, to the case at bar, a claim of the Indiana Rolling Stock Company for the rental of rolling stock used by the receiver amounting to $11,000 was also preferred by the final decree over the first mortgage bonds, to be paid either from the income of the road or from the proceeds of the foreclosure sale. The nature of this claim is not fully set forth, in the opinion of the court, in *Miltenberger* v. *Logansport R. Co.*, but we have inspected the printed record of that case, in which the history of the claim of the Indiana Rolling Stock Company fully appears in the master's report at pages 378 and 379. From the master's report it appears that the rolling stock was leased by the Indiana Rolling Stock Company, to the Logansport, Crawfordsville and Southwestern Railway Company, before the appointment of a receiver. The railroad company was in arrears for rent when the receiver was appointed, and, as in the case at bar, under the terms of the lease the lessor had the right to reclaim its cars. The receiver continued to use them without any order of court authorizing their use. He also, without authority of the court, agreed with the

rolling stock company that it should be paid the same rental as under the original lease. The receiver used the cars for a considerable period under this arrangement when, being unable to complete his payments, he surrendered them to the rolling stock company. For the rental of the cars while so used by the receiver, without any authority from the court, the court awarded priority of payment to the claim of the Indiana Rolling Stock Company, amounting to $11,000, out of the proceeds of the foreclosure sale, and the decree was, in all respects, affirmed by this court.

It is to be observed also that this priority for car rentals was allowed wholly irrespective of any question of diversion of current income during the receivership. So far from there being any diversion, it appears, from the opinion of this court, on page 298, that the current receipts were insufficient to meet the obligations of the receiver and he was authorized to issue certificates to the amount of over $200,000.

The case is also an instructive one upon the point which will doubtless be urged by appellant in this case, that the Toledo, Cincinnati and St. Louis Railroad was operated at a loss by the receivers and therefore the owners of rolling stock must lose their entire rentals. The court say (page 308):

"A court of equity, however it might act on questions of original authority or discretion if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with the receiver within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit, or of those represented by him."

By the order of August 2, 1883, appointing Dwight receiver (page 15), he was directed "to take charge of,

"care for and operate" the railroad. To comply with this order the use of rolling stock was indispensable. Substantially all of the rolling stock upon the road was held under car-trust leases. Without its use the receiver would have been unable to comply with the order of his appointment. The use of the entire equipment, as already shown by the testimony of Receiver Craig, was indispensable to the proper management of the road. The mortgage bondholders, through their trustee, were present in court when the original order appointing Dwight was made. October 20, 1883, the Central Trust Company filed its bill for the foreclosure of the mortgage upon the Toledo division. November 27, 1883, the Dwight receivership was, on motion of the Central Trust Company, extended to this suit. June 17, 1874, the Central Trust Company filed its bill for the foreclosure of the mortgage upon the St. Louis division. During all this time the receiver continued to use the rolling stock in question without objection upon the part of either trustees or mortgage bondholders. It was not until November 28, 1884, that the Quigley committee of bondholders presented their petition praying that the receiver might be required to surrender the cars to the various owners, upon which the order of December 1, 1884, for the surrender was made. With full knowledge, therefore, both actual and constructive, of all that was being done by the court and its receiver in the use of the cars, the bondholders took no steps to terminate such use until the filing of the Quigley petition, November 28, 1884. In view of these facts it is idle for the bondholders to assert that they are not bound by the conduct of the receiver, or that they can escape payment for his obligations thus incurred. That the road may have proved to

be an injudicious investment, or its operation unprofitable, surely affords no excuse for the attempted repudiation of the car rentals. That the bondholders saw fit to invest their money in a new and comparatively untried system of railroad, and to permit its operation by the receiver for a period of more than a year, without taking steps to terminate such operation, affords no justification for non-payment of the indebtedness thus incurred by the receivers. As well might it be contended that the receiver's employes should be postponed to the mortgage bondholders, because of the unprofitable operation of the road by the receiver.

To the same point, of the inaction of the bondholders as an estoppel from questioning priority of receiver's indebtedness, is the language of this court in the Miltenberger case, upon the allowance of priority for the rentals of the leased line by the receiver in that case. The rental for the leased line in that case, as for the cars in the case at bar, was fixed by the court upon the basis of a *quantum meruit*. The court say upon this point (106 U. S., 313):

"We see no valid objection to this allowance. It is on the basis, not of the lease, but of the actual value of the use of property used by the receiver, with the clear assent, under the circumstances, of all parties interested, which use the first-mortgage bondholders and their trustees chargeable with full knowledge, never sought to prevent, such use being founded on the lease, which was property in the hands of the mortgagor. The line was used for the benefit of the mortgagor's road and of the holders of the bonds under the mortgages, with their acquiescence. Whatever the court would have done, as an original question, if called on to determine whether the receiver should use and run the Evansville road, these appellants must now be held in view of all the facts, to have consented to treat the right to run that road, and take its income, as if that right were a part of the mort-

gaged property and subject to the same rules as the other mortgaged property. This leads to the allowance, also, of the claims for operating supplies and material, including steel rails furnished for that road while so run."

The language here quoted applies with peculiar force to the case at bar. In this case, as in the Miltenberger case, the allowance of rental is based upon the actual value of the use of the property by the receiver, with the clear assent of all parties interested, which use the mortgage bondholders and their trustees, chargeable with full knowledge, never sought to prevent. The car-trust leases in this case, like the railroad lease in that, were property in the hands of the mortgagor. They were used for the benefit of the road and of its bondholders, with their acquiescence. Whatever the court might have done as an original question, had the use of this equipment by the receivers been objected to by the bondholders at the beginning of the receivership, they must now be held estopped by their consent from questioning such use and the obligations thereby incurred. Having consented to the continued use of our equipment and taken its income, without which the road would have had no earning capacity, the right to such use must, as in the Miltenberger case, be treated "as if that right were a part of the mortgaged "property, and subject to the same rules as the other "mortgaged property."

So in *Wallace* v. *Loomis*, 97 U. S., 146, decided earlier than *Fosdick* v. *Schall*, this court affirmed a decree of the Circuit court awarding priority to receiver's certificates issued, among other things, for procuring necessary rolling stock for the use of the road by the receiver. In affirming the decree upon this point, this court say (page 162):

"The only other material objection made by the appellant to the decree, not already disposed of, is, that it declared the amount due on the receivers' certificates to be a lien on the property in their hands prior to that of the first mortgage bonds. The history of these certificates has already been referred to. The receivers were authorized by the order appointing them, amongst other things, to put the road in repair and operate the same, and to procure such rolling stock as might be necessary; and, for these purposes to raise money by loan to an amount named in the order, and issue their certificates of indebtedness therefor; and the order declared that such loan should be a first lien on the property, payable before the first-mortgage bonds. The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the company, and to make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction always exercised by the court by which it is its duty to protect and preserve the trust funds in its hands."

In the recent case of *Union Trust Company* v. *Illinois Midland R. Co.*, 117 U. S., 434, this court has gone further in allowing priority, not only to receiver's indebtedness, but to indebtedness of the railroad company antedating the receivership, than in any preceding case. The receivership in that case, as in this, had its origin in a bill in the nature of a creditors bill, which was followed by a series of suits for the foreclosure of mortgages upon the three constituent divisions of the consolidated railway of the Illinois Midland Company, but no receiver was ever appointed under the foreclosure suits, as such, nor was any extension of the original receivership ever made to such suits. All these allowances, embracing claims for labor, material, supplies and car rentals, were given priority in the absence of any proof of diversion of current in-

come during the receivership. So far from any proof of diversion being shown, there was in reality scarcely any income to be diverted, and the road was operated at a constant loss by its different receivers. So great was the deficiency of current income to meet the current expenses of the receivership, that eighteen different series of receiver's certificates were issued, at different times, in payment of obligations incurred by the receivers, and most of these were awarded priority of payment by the Circuit court, whose decree in this respect was affirmed by this court.

It is true that in the Illinois Midland case one claim for car rentals, viz: that of Waring Brothers, was disallowed by the Circuit court and by this court. The case, as reported, does not state the facts in detail concerning this claim. We have, however, examined the printed record in that case, from which it appears that the entire history of the claim of Waring Brothers for car rentals against the receivership consisted of a series of frauds which were attempted to be perpetrated upon the bondholders with the connivance of the receivers, two of whom, Genis and Rees, were acting at the same time in the dual capacity of receivers of the road and agents of Waring Brothers. A large part of the rolling-stock, for which rentals were claimed by Waring Brothers, was shown to have been the property of the Paris and Decatur Railroad Company, one of the companies merged by consolidation in the Illinois Midland. By some legal jugglery the Paris and Decatur equipment was transferred to Waring Brothers, and by them leased, under a car-trust lease, to the railroad company. Other equipment owned by Waring Brothers was also leased under car-trust leases to the receivers. From time to time during the

history of the three successive receiverships of the road, after large payments had been made of the rental due under the equipment leases, but the receivers being in default as to some of the payments, petitions were filed by Waring Brothers demanding the surrender of their cars for non-payment of rental, and an allowance for the rentals due. To these petitions, from time to time, the receivers, who were also the paid agents of Waring Brothers, filed their answers admitting the allegations of the petitions, and consenting to the relief demanded. Orders were thereupon entered for the surrender of the rolling-stock to Waring Brothers, and for an issue of receiver's certificates for the payment of the unpaid rentals. Waring Brothers then made new car-trust leases, leasing the same rolling-stock back to the receivers; its use was continued by the receivers for a considerable time, some payments being made, and others being in default; the same process was then repeated of the filing of a new petition by Waring Brothers, demanding the surrender of the equipment, to which petition the receivers, by their answers, again gave willing consent, and like orders were entered as before, for the surrender of the cars to Waring Brothers, and for the issuing of a new series of receiver's certificates for the payment of the rentals. This came to be the established procedure between the parties, and the rolling stock in question, a large part of which was originally that of one of the companies, was thus transferred and retransferred, and its rental paid for again and again by receiver's certificates, the transactions being repeated in this form, as appears from our examination of the original record, at least three or four times. Under this artless and simple procedure, an apparent indebtedness of over $300,000

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was claimed by Waring Brothers for the rental and depreciation of rolling stock, a portion of which was the property of the company itself. The Circuit court refused to allow them priority. This court, affirming the decree, say upon this point (page 479):

"Waring Brothers also object because the final decree orders that the 'rents due Waring Brothers. for use of rolling stock, as shown by schedules U and W of' the final 'report of the special commissioner,' and 'the sum of $21,099.43 due Waring Brothers for the extraordinary depreciation of rolling stock,' be subordinated to the mortgage bonds of the three sectional roads, respectively. The net amount due for the above rents, as stated in these schedules, with interest to January 15, 1885, is $325,354.35, and that amount is allowed as a debt by the commissioner. The court did not allow its priority, and we see no sufficient ground for reversing the decision. The same conclusion is reached as to the item for $21,099.43."

It would have been strange indeed if this court could have seen "any sufficient ground for reversing the de-"cision" upon so extraordinary a state of facts. And so far from the Illinois Midland case affording any authority for disallowing claims for rental of cars used by the receiver in good faith, in the absence of fraud, exactly the contrary doctrine was announced in that case, and several claims for car rentals, which had been given priority out of the proceeds of the foreclosure sale by the decree of the Circuit court, were affirmed by this court. Mr. Justice Blatchford, at page 464 of the opinion, passes upon five different items or classes of claims, which were given priority by the Circuit court, including "(3) the general "indebtedness of the receivership, as shown by Schedule "M of the report under the head of 'supplies,' amounting "to $67,787.76, and under the head of 'damages,' "amounting to $5,871.04, and forty-four items under the

"head of 'miscellaneous,' amounting to $32,937.49." As to these claims, Mr. Justice BLATCHFORD says (page 464):

"As to items (1), (2), (3), (4) and (5), while it is admitted that these debts were incurred for the ordinary expenses of the receivers in operating the road, it is contended that they are entitled to priority only out of the income of the road, and not out of the proceeds of the property itself. Of course such items are payable out of the income, if any, before the *corpus* is resorted to, but that may be resorted to when the items are proper ones to be allowed for the operating expenses, after scrutiny and opportunity for those opposing to be heard. This view is in accordance with the principles above laid down, and the authorities above cited."

The opinion does not give in detail the items which were thus affirmed by the court as embraced in Schedule M of the commissioner's report. But referring to the transcript of the record on file in this court, among the claims embraced in Schedule M, which were thus given priority, were those of the Brazil and Chicago Coal Company for the use of cars, amounting to $1,008.02; and the claim of the United States Rolling Stock Company for rental of cars and supplies, $17,307.68. The decree of the Circuit court, which was affirmed here, also allowed priority to the claim of the Indianapolis, Bloomington and Western Railway Company for $7,045, which appears to have been for the rental of locomotives of that company, used by the receiver, as well as the claim of the Louisville, Evansville and St. Louis Railroad Company for $1,597.21, which appears to have been for the use of rolling stock of that company by the receiver. And not only were large amounts thus paid out of the proceeds of the foreclosure sale for the use of rolling stock by the receivers, but substantially all claims for

material labor and supplies furnished to the receivers in good faith were paid in full, as well as large amounts due for labor and supplies prior to the appointment of the receiver—and all this with no proof of diversion, and indeed with no income to divert, the road being operated by the receivers at a constant loss.

This discussion, already too much prolonged, might well rest here. But it is proper to suggest the element of public policy which enters into this class of cases, which seems to have been wholly overlooked by counsel for appellant, but which furnishes additional ground, if such were needed, for the payment of all indebtedness incurred by a court of equity through its receiver in the management of railway property. The property and franchises of a railway company are held by a peculiar tenure, and are impressed with a duty to the public which distinguishes this class of property from all others. The valuable franchises conferred by the state upon railway companies are not mere gratuities. In every charter grant of such franchises by the state, there is implied a corresponding obligation upon the part of the railway company to faithfully discharge its duties to the public as a common carrier. The grant of the franchise carries with it a corresponding obligation resulting from its acceptance by the company, the grant and the obligation being mutual and reciprocal and establishing a relation of contract between the parties. When by reason of the insolvency of the company and the pressing importunities of its creditors, it seeks, as is usually the case, the friendly interposition of a receiver, or when the mortgage bondholders procure such relief, the railway company consenting, as is usually done, it is the duty of the court assuming control of the property and franchises of the

company thus charged with a duty to the public, to discharge that duty in so far as possible, and thus to preserve the franchises of the company unimpaired for the benefit of the mortgage bondholders. But the court is powerless to properly discharge the trust without the usual appliances necessary for the operation and management of a railway. Material, supplies, rolling stock and labor are the necessary elements. These must be had, and the obligations of the court and of its receiver in procuring them become an indebtedness of the highest possible character, viz: an indebtedness of the court engaged in the management of a trust estate. The element of public interest and of public duty, as here suggested, was fully recognized by this court in *Barton* v. *Barbour*, 104 U. S., 126. Upon this point, Mr. Justice Woods, delivering the the opinion, says (page 135):

"A railroad is authorized to be constructed more for the public good to be subserved, than for private gain. As a highway for public transportation, it is a matter of public concern, and its construction and management belong, primarily, to the Commonwealth, and are only put into private hands to subserve the public convenience and economy. But the public retain rights of vast consequence in the road and its appendages, with which neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is, therefore, a matter of public right, by which the courts, when they take possession of the property, authorize the receiver or other officer in whose charge it is placed, to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not suffer detriment by the non-user of the franchises. And in most cases the creditors can not complain, because their interest, as well as that of the public, is promoted by preventing the property from being sacrificed at an untimely sale, and protecting the franchises from forfeiture for non-user."

The same principle was recognized and applied in the Illinois Midland case in the following language from the opinion of Mr. Justice BLATCHFORD. (117 U. S., 455.)

"Property subject to liens and claims and debts, of various characters and ranks, which is brought within the cognizance of a court of equity for administration and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable, it must be sold, by way of preservation. A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good-will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given, not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view, that if it falls into insolvency and its affairs come into a court of equity for adjustment involving the transfer of its franchises and property by a sale into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property has the power and, under some circumstances, it may be its duty to make such repairs as are necessary, to keep the road and its structures in a safe and proper condition to serve the public."

Appellant seeks, in effect, to overthrow this salutary doctrine, affirmed by repeated decisions of this court. Let it once be established as the rule of this court that obligations for material, labor, supplies and for the use of rolling stock, incurred by a receiver in the operation of a railway, are to be paid only out of net income or upon

proof of diversion, and the courts will be powerless to operate for a single day a mile of railway. Few roads are operated by receivers at a profit; net income rarely results from such operation. If the laborer, materialman or owner of equipment is to be told that he extends credit to a court of equity managing such property, at the peril of being compelled, through the expensive machinery of legal proceedings, references to masters and accountings, to establish a diversion of current income, no man will hereafter be found to embark his capital, whether in the form of labor, material or equipment, in such enterprises.

As was said by Chief Justice WAITE, in *Fosdick* v. *Schall:* "The business of all railway companies is done "to a greater or less extent on credit." Such credit is even a more necessary factor in the operation of a railway by a receiver than by the corporation itself. But if a court of equity, obtaining such credit to preserve the property and franchises of the company in the interest of the public and for the benefit of its bondholders, may, in the absence of net income, repudiate its obligations for indebtedness thus incurred, then to every order hereafter entered appointing a receiver over a railway may be added a provision for the absolute suspension of all operation; since this will be the inevitable result if the contention of appellant shall find expression in the judgment of this court. And for the reasons here suggested, the decree of the Circuit court should be affirmed.

Respectfully submitted.

J. L. HIGH,

Counsel for David B. Paul, Trustee, and the United States Rolling Stock Company, Appellees.

CHICAGO, March, 1890.

Suggestions in Reply to Appellant.

Since writing the foregoing pages, the undersigned has received a copy of the brief of Mr. John M. Butler, counsel for appellant. Most of its positions have been anticipated and discussed in the preceding pages. Some additional suggestions, however, seem necessary to correct certain misapprehensions of fact upon the part of counsel for appellant.

At page 16 of his brief, counsel for appellant makes the remarkable statement that the Quigley committees of bondholders entered into an agreement with Kneeland, under which the latter agreed to purchase at the foreclosure sale the entire line from Toledo to East St. Louis, to organize new companies in the different states, to take the property and consolidate the new companies into one corporation, to widen the gauge, to reconstruct and equip the entire line as a standard-gauge railway, and that under this alleged agreement Kneeland became a trustee representing the first-mortgage bondholders of the entire line, as well as the purchaser at the foreclosure sales. This statement can have but one purpose, viz: to show an appealable interest in Kneeland as a representative of the first-mortgage bondholders. The undersigned has been concerned in this litigation from the beginning; he has grown old and gray in endeavoring to secure to his clients the modest allowance of rental finally awarded by the Circuit court; he had supposed himself to be familiar with the entire record, but he is now advised for the first time, by a mere statement of counsel for appellant, that Kneeland purchased as a trustee for the bondholders,

pursuant to an alleged agreement to that effect. The record may be searched in vain for any hint or suggestion of this pretended agreement under which it is alleged that Kneeland purchased as a trustee and representative of the bondholders. He appears in the record for the first time as the purchaser at the foreclosure sales, the masters reporting in each case that they sold the property to Sylvester H. Kneeland, with no hint or suggestion that he purchased in any other than his individual capacity, and the record is wholly barren of any proof that Kneeland was himself a bondholder, or that the relation, either of agent or of trustee to the bondholders, existed. His right to appeal, therefore, rests upon the sole fact of his purchase at the foreclosure sales under decrees binding him to the payment, as a part of the purchase money, of whatever claims might be awarded priority over the first-mortgage bonds.

It is true, as a matter of fact, that in each of the foreclosure decrees (pages 470, 481) a provison is inserted reserving to the purchaser the right to appeal from any orders awarding priority of payment over the first-mortgage bonds. It would seem to be equally true, as a matter of law, that such reservation can confer no right of appeal upon one who is not otherwise invested with such right. As has already been shown in the preceding pages, it is the established doctrine of this court, as announced in *Swann* v. *Wright's Executor*, 110 U. S., 590, and in *Stuart* v. *Gay*, 127 U. S., 518, that a purchaser under a foreclosure decree, who, as in this case, purchases subject to such priorities as may be afterward allowed by the court, has no appealable interest, and cannot question the allowance of such priorities, either by an original action, as was attempted in *Swann* v. *Wright's*

Executor, or by an appeal from such decrees, as was attempted in *Stuart* v. *Gay*. The attempted reservation, therefore, in the foreclosure decrees of the right of appeal to the purchaser amounts to no more than a recital that such purchaser, if otherwise entitled under the decisions of this court to maintain an appeal, may invoke the appellate jurisdiction of this court. And to assert that a mere recital in a decree in equity that any person named therein may appeal from such decree confers or creates an appealable interest, is equivalent to asserting that the Circuit court may, by its final decree, confer upon any stranger to the record the right to invoke the appellate jurisdiction of this court, and to question the correctness of a decree with which all parties to the record are content.

For the purpose of convincing the court that the mortgaged estate during the Craig receivership is not liable for car rentals during the Dwight receivership, counsel for appellant has, throughout his entire argument, treated the Craig receivership as a new and independent receivership, having no connection with that of Dwight under the Braman bill. No hint or allusion is made to the fact that when Dwight was appointed receiver under the Braman bill, August 2, 1883, (pages 14 and 16) the Central Trust Company and Thomas A. Hendricks, trustees under the first mortgage of the Toledo division, both of whom were parties defendant to the Braman bill, appeared in court and neither objected nor consented to the appointment of the receiver. Counsel for appellant also ignores the fact that after the Central Trust Company filed its bill for the foreclosure of the Toledo division mortgage, and praying for the appointment of a receiver, on November 27, 1883 (page 72), an order was entered in the foreclosure case reciting the filing of

the Braman bill, and the appointment of a receiver thereunder, and that "on motion of Thomas E. Stillman, "solicitor for said Central Trust Company, it is ordered "that the receivership already existing under the order "heretofore entered is hereby extended over and made to "apply to the premises and property sought to be fore-"closed in this action." The Dwight receivership having thus, upon the application of the trustee, been extended to the foreclosure case, Dwight tendered his resignation, and on November 28, 1883, orders were entered in both the Braman and the foreclosure cases (page 73) accepting the resignation of Dwight, and appointing William J. Craig as receiver "in the place and stead of said Edward "E. Dwight." The trustees in the mortgage having thus been parties defendant to the Braman creditors bill, having been present in court by counsel upon the appointment of Dwight as receiver and having made no objection thereto, and having afterward procured the extension of the Dwight receivership to the foreclosure suit, they, and the bondholders whom they represent, are estopped from questioning the continuous character of the receivership from the date of Dwight's appointment to the termination of the litigation.

The claim of Pennock Brothers, for car rentals, upon their petition of intervention, to which reference is made at page 25 of appellant's brief, is not involved in this appeal. The amount awarded to Pennock Brothers being less than $5,000, the court refused to permit an appeal from its allowance.

At page 32 of appellant's brief it is stated that the owners of this equipment carefully sought out this narrow-gauge system "and unloaded their narrow-gauge equip-"ment upon it under contracts of conditional sale." So

far from this being true, the testimony accompanying the report of Special Master Cox shows that the railroad company itself solicited and procured the building of the cars; that it furnished the specifications upon which they were built, requiring the cars to be constructed for the necessities of this particular road, and that the contracts were let after close competition had been invited by the railroad company from a large number of car builders throughout the country.

At page 68 of appellant's brief, the remarkable statement is made that the owners of the equipment "never "asked any order of court regarding rental of their equip- "ment. They did not even ask that the master be re- "quired to investigate and report as to whether the use "of their equipment was necessary, or as to whether its "use would be profitable to the receivership." Upon this point we are content to let the record speak for itself. The order of reference to Special Master Cox, of April 11, 1884 (pages 126, 127), entered as the result of a hearing in which counsel for the car trusts and for the trustee in the mortgages participated, directs the master to report among other things, as follows:

"3. What and how much of the said rolling-stock or equipment the receiver appointed in this action has had in his possession and use since his appointment other than that part of the said rolling-stock covered by the said mortgage, and generally what use has been made thereof by the present receiver, and what part thereof still remains in his possession and use, and as to the propriety or necessity of the continued use and employment on the road of any part of the said rolling-stock or equipment not covered by the said mortgage, and as to what would be to the owners thereof a fair and just compensation for the past and future use of such rolling-stock; what, if any, deterioration or loss it has suffered between the date of its delivery and the appointment of the receiver and what since his appointment."

In accordance with this direction in the order of reference, and as fully negativing the repeated assertions of counsel for appellant that the rolling-stock was in excess of the needs of the receiver, the testimony of Receiver Craig (pages 610, 611) was taken by the undersigned before Special Master Cox, in which the receiver testified that the business of the road required the use of all the rolling-stock in question. His testimony is quoted in full at page 57 *ante*, and need not be repeated here. It is the testimony of the receiver selected by these bondholders themselves, through their trustees, thoroughly familiar with the necessities of the system which he was operating, and it was never questioned or denied by any witness in the case. It is true that Special Master Cox did not, in express terms, report any finding as to the necessity for the use of the rolling-stock. He did, however, report (page 210) that the rolling-stock was reasonably built for the purposes of the road in accordance with specifications and patterns furnished by the company, and that it was accepted by the officers of the company in good faith, without fraud or collusion. He also reports (page 212) that the owners of the equipment could not have found a market for their rolling-stock, if thrown upon the market as a consequence of the failure of this narrow-gauge system, and that the receiver "could not have found other "similar rolling-stock to take its place, if deprived of it."

It is also asserted that the receiver had in his possession sufficient equipment belonging to the company to operate at least one mixed train a day, and that the interests of the bondholders would have been promoted had all our equipment been surrendered to us long prior to the date of its actual surrender. The fallacy of this assertion is shown by the order of January 1, 1885, (page 321), en-

tered with the consent and at the request of the trustees and bondholders, directing the receiver to withdraw all trains except one mixed train for freight and passengers one way daily, the order further providing that "said "receiver is authorized and directed to lease or otherwise "procure the necessary equipment for the operation of "such trains only." The order further directed the receiver to report within ten days the number of engines, cars and other necessary equipment leased or otherwise procured by him, together with the compensation agreed to be paid for the same. January 13, 1885, the receiver reported (pages 358 to 360) that he had received proposals from different owners of rolling-stock suitable for his purposes, and submitted a form of lease for the approval of the court, the lease specifying the rentals to be paid for the different classes of rolling-stock. January 20, 1885, an order was entered, the bondholders' committee appearing by their counsel (pages 360, 361) ratifying the form of proposed lease, and the monthly rentals, and directing the receiver to lease upon the terms specified, the following equipment (page 360):

Locomotives	15
Coal cars	75
Stock cars	25
Pay car	1
Box cars	300
Flat cars	50
Passenger cars	10
Cabooses	11

The monthly rental fixed in the form of lease thus approved by the court was as follows (page 360):

Locomotives	$80 00
Passenger coaches	20 00

Baggage, mail and express cars, and cabooses	10 00
Box and stock cars	4 00
Coal or flat cars	3 00

So far, therefore, from the receiver having sufficient equipment of his own to operate even one mixed train daily, it is thus shown, by the order of January 20, 1885, which, if the writer remembers correctly, was drawn by the present counsel for appellant, that even with the operation of the road thus crippled and reduced to a single daily train, the receiver was compelled to lease the large amount of equipment above specified at the monthly rentals above shown, which rentals in his report of January 13, the receiver says (page 358) are "based upon "the lowest and best offers received by me." These rentals are, for locomotives, passenger and baggage cars, a little lower than the monthly rentals allowed to appellees in this cause, while for box, stock, coal and flat cars they are substantially the same.

Even if the question of the necessity for the use of our equipment were otherwise an open question upon this record, appellant would be concluded upon this point by the order appointing Dwight receiver of the road, which was subsequently extended to the foreclosure suit. By this order (page 15) the receiver "is ordered and di-"rected to take possession of, maintain and operate the "said railroad." * * * "And the said receiver is "hereby clothed with all the authority and rights usually "given to a receiver by courts of equity, to take charge "of, care for and operate a railroad." This plainly imports that he was to operate the road in the usual manner, with the customary appliances, to the same extent that it had been operated by the company itself, and with

the same equipment and facilities, and not a mere nominal operation by running one mixed train daily for the purpose of maintaining the naked franchise of the road, as was afterward done by the order of January 1, 1885. The receiver being thus directed to operate the road in the usual manner and with the usual appliances, and the testimony of receiver Craig as to the necessity of all of the equipment for the proper management and operation of the road having never been questioned by any witness in the cause, no bondholder can be heard to assert that the use of all our equipment was an act of improvidence upon the part of the receiver, at least until such bondholder has taken affirmative steps to curtail such use. No such steps were taken by the bondholders until the intervention of the Quigley committees, November 10, 1884 (page 268), who, on November 28, 1884 (page 287), prayed that the receiver be directed to surrender to its owners all rolling stock not belonging to the road, and who afterward procured the order of January 1, 1885, reducing the operation of the road to one mixed train daily. Had the bondholders believed the use of our equipment to be unnecessary, it was at all times within their power to bring the question to the attention of the court, and to procure an order upon the receiver curtailing the use of this equipment. It is admitted by counsel for appellant that interest upon all of the mortgage bonds was in default from and after July 1, 1882. For more than two years after their interest was in default, the bondholders thus consented to the continued use of all this equipment by the railroad company and by its receivers, and made no sign. Being present in court through their trustees upon the appointment of the receiver on the Braman bill, and upon the filing, by their

trustees, of the subsequent bills for foreclosure, they are thus bound by actual and constructive knowledge of all that was being done by the receivers in the operation of the road. And, as was said by this court upon a similar question in *Miltenberger* v. *Logansport R. Co.*, 106 U. S., 313, whatever the court would have done as an original question, if called upon to determine whether the receivers should continue the use of the leased property, the bondholders must now be held, in view of all the facts, to have consented to such use. Especially is this true when they were confronted by the order of reference of April 11, 1884, to Special Master Cox, directing him to report what would be a fair rental to the owners of the equipment for its use by the receivers. Here was a distinct notice to the bondholders by the court itself that the cars could not be used by the receivers without the payment of a fair rental based upon a *quantum meruit*. And still the bondholders permitted nearly a year to elapse before asking the court for an order upon the receiver to surrender the cars.

With tiresome iteration upon page after page of his printed argument, counsel for appellant denies our right to the recovery of rental, because we voluntarily left our equipment in the possession of the receivers of an insolvent railway company without demanding its return or declaring any forfeiture under the leases, and with no contract fixing the rate of rental. But the receivers voluntarily used our property for seventeen months, just as they used all other property pertaining to the road. The trustees and the mortgage bondholders voluntarily permitted such use for this entire period. With full opportunity at every stage of the litigation to protest against this use of our property, the bondholders voluntarily per-

mitted it to continue unquestioned for the entire period in controversy. The case is, therefore, simply a case of tenancy at will, the owners of the property permitting its use by the receivers and bondholders, and the latter continuing such use without any specific contract fixing the compensation to be paid. In such case the rights and obligations of the parties are mutual and reciprocal, and the law implies an undertaking upon the part of the lessees to pay a reasonable rental. To assert that, because the transaction was voluntary upon both sides, and not had under duress, or fixed by contract, the lessee is absolved from paying a fair rental for the property, is puerile. Exactly such a voluntary use was had in *Miltenberger* v. *Logansport R. Co.*, 106 U. S., 286, of a line of railway which had been leased to the company, and of equipment also held by the company under leases, with no order of court authorizing the receiver to use such leased property, or fixing the amount of rental which should be paid for its use. The Circuit court awarded payment upon the basis of a *quantum meruit*, and its decree was affirmed here. The owner of the leased line in that case voluntarily permitted its property to be used by the receiver, with no contract or order of court authorizing such use or fixing the rental. The court, disregarding the terms of the lease, awarded a rental for the leased line, and for the use of an engine belonging to the lessor company, upon the basis of a fair rental value as reported by the master. Exactly the same thing was done in the case at bar. This court may, therefore, well apply to this case the doctrine which it announced in *Miltenberger* v. *Logansport R. Co.*, 106 U. S., 313, viz:

"We see no valid objection to this allowance. It is on the basis, not of the lease, but of the actual value of the

use of the property used by the receiver, with the clear assent under the circumstances of all parties interested, which use the first-mortgage bondholders and their trustee, chargeable with full knowledge, never sought to prevent, such use being founded on the lease, which was property in the hands of the mortgagor."

To the assertion repeatedly made by counsel for appellant, that the petitions of intervention of Paul and of the United States Rolling Stock Company, did not ask for rental, but prayed the specific performance of the car-trust agreements, it would seem to be sufficient to say that each of those petitions contained a prayer for general relief. Of course it was the duty of counsel framing those petitions, to pray for the fullest relief possible, and it was equally their duty to accept, with becoming resignation, under the prayer for general relief, such modest redress as the court might and did give. Certainly no bondholder can claim to have been surprised by our demand for car rentals, when, by the order of reference to Special Master Cox, of April 11, 1884, the Master was specially directed to report what would be a fair rental for the equipment upon a *quantum meruit*.

At page 73 of his printed brief, counsel for appellant indulges in some extravagant assertions as to the payments originally made to appellees by the railroad company, under the car trust leases, prior to the appointment of a receiver. The point is not deemed material, but to correct any possible misapprehension, it is proper to state that the United States Rolling Stock Company, as appears by the testimony of Mr. Benn, its treasurer (pages 623, 624), did receive some payments in cash from the railroad company for its cars, furnished under Boston Car Trust, Series H and M. But under its lease of 250 box cars, under Massachusetts Car Trust, Series A, comprising by far the

larger part of the equipment which it furnished, no cash whatever was paid, and as appears by the testimony of Mr. Blain (pages 632, 633), who manufactured the cars represented in this litigation by David B. Paul as trustee, no cash payment whatever was made.

Counsel for appellant also refers to an alleged report or statement as to the condition of the road and its indebtedness, which he says was made by receiver Craig. This work of art does not appear in the record of this case, but appears at pages 179 to 203 of the record in *Kneeland* v. *Ballou*, No. 1,537, which we have stipulated may, with the consent of the court, be tried with this case. It is an anonymous production, entitled, "Toledo, Cincin-"nati and St. Louis R. R. Statement by the receiver." Its authorship is an unknown quantity. It was never offered in evidence by any party to the litigation. It is not identified as an exhibit, or alluded to by any witness, or referred to by the master in his report. Its authorship is a literary problem surrounded with as much mystery as the authorship of the plays of Shakespeare. Its connection with, and place in, the record are matters of equal mystery.

To the assertion that rentals should have been allowed upon the basis of actual mileage, instead of monthly rentals, it would seem to be a sufficient answer to say that no proof was ever offered as to what was a fair rental either for empty or loaded cars upon the mileage basis, the entire case before the masters proceeding upon the theory of monthly rental. It is true that in the case of *Kneeland* v. *Ballou*, No. 1,537, the witness, Neal McKinnon (Record, No. 1,537, pages 123 to 134), presents some statements showing the mileage of a portion of the cars during a fragment of the time in controversy. The

same witness admits that no record of mileage was kept during several of the months, and his tables all terminate with July 31, 1884, while our equipment continued to be used by the receiver until January 1, 1885. His tables of mileage are confined to a portion of the cars in the Boston car trust, during a portion of the period in controversy. No mileage is given for any of the cars in the Massachusetts car trust, comprising a large part of the entire equipment upon the road. Upon this fragmentary basis he estimates the mileage of loaded cars at one-half a cent per mile, allowing nothing for empty cars. He does not even testify that this mileage is a fair and reasonable rate, and no witness was called upon this point. Upon these fragmentary, mutilated and inadequate data, without proof as to what would be a fair rental upon the mileage basis, and with no proof as to the mileage made by the larger portion of the equipment, the question of mileage may well be dismissed with one further consideration:

That consideration is, that not only did the entire case in the court below proceed upon the theory of monthly rental instead of mileage, but monthly rental was the basis upon which, apparently with the full approval of the bondholders, the receiver himself leased the equipment necessary, after the return of our cars, to enable him to comply with the order of January 1, 1885, to run one mixed train daily. The order of January 20, 1885 (pages 360, 361,) approved of the form of lease submitted by the receiver, and directed him to hire the rolling stock upon the terms specified in the lease, those terms being monthly rentals as already shown. The rates of monthly rental thus fixed for box and flat-cars are substantially identical in amount with those

finally allowed us after the last reduction of fifteen per cent., made by the court. The bondholders thus themselves recognized, by procuring the entry of this order, the propriety of the monthly basis of rental, as well as of the amounts actually allowed us.

In his discussion of *Fosdick* v. *Schall*, counsel for appellant states that the Circuit court decreed that Schall be paid for the use of his cars during a portion of the receivership, and during six months next prior to the first receivership. As has already been shown (page 63 *ante*), Schall had been paid in full for the use of his cars during the Anderson receivership, in the Fosdick case. The Anderson receivership was a new and independent one, originating in the Fosdick case. Schall's claim was to recover for the use of his cars by Hammond & Brown, receivers appointed in another and independent suit in the state court, which receivership was never extended to the Fosdick suit, and also to recover for the use of his equipment by the company prior to the receivership. Surely a distinction with a difference.

Huidekoper v. *Locomotive Works*, 99 U. S., 258, cited by appellant, has no application to the case of receiver's indebtedness. The objection of the bondholders to the allowance to the locomotive works in that case was based upon the fact that it was a mere claim for money due on an account closed before the appointment of the receiver, and this court expressly say in the opinion (page 260): "The amount found due the Locomotive "Company is not in reality for the use and repair of the "engines, but on account of what was agreed to be "paid for the purchase."

Nor does the case of *St. Louis, Alton and Terre Haute R. Co.* v. *Cleveland, Columbus, Cincinnati and Indian-*

apolis R. Co., 125 U. S., 658, cited by counsel for appellant, establish any rule for the allowance of receiver's indebtedness. The claim of the intervenor in that case, the St. Louis, Alton and Terre Haute Railroad Company, was for rental of its lines, leased to the Indianapolis and St. Louis Company, and used by the latter before the appointment of a receiver over the latter company in foreclosure proceedings, and by the receiver afterward. As appears by the statement of the case, at page 663, the Circuit court decreed payment of rental to the petitioner for the use of its road while in the possession of the receiver in the foreclosure suit. The propriety of this portion of the decree was not questioned. But from that portion of the decree allowing rental for the use of the leased line by the lessee company before the appointment of the receiver, an appeal was taken, and that part of the decree was reversed by this court. So far from the opinion of this court in that case denying priority to receiver's indebtedness, it substantially concedes such priority, and only applies the doctrine of diversion as the measure of the right of recovery for the use of property by the railroad company prior to the receivership.

Respectfully submitted.

J. L. HIGH,

Counsel for David B. Paul, Trustee, and the United States Rolling Stock Company, Appellees.

CHICAGO, March, 1890.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 252.

SYLVESTER A. KNEELAND, APPELLANT,

v.

THE AMERICAN LOAN AND TRUST COMPANY, OF BOSTON ET ALS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Supplemental Brief for the American Loan and Trust Company, of Boston, and E. B. Phillips, Trustee.

PRELIMINARY STATEMENT.

The elaborate statement of facts in the brief for the appellant makes it necessary on the part of the appellees to call the attention of the Court to certain facts.

The original bill was filed by one Braman, a judgment creditor. The road was in two circuits and three States. The main line, so called, which is the one principally considered in this case, ran from Toledo to East St. Louis. From

Toledo to Delphos was in the State of Ohio. The Western branch extended from Delphos to East St. Louis, and the Eastern branch from Delphos to Dayton, from Dayton to Cincinnati, and also from Dayton to Ironton on the Ohio River.

The application in the Braman bill for a receivership was made to Judge Drummond in the Seventh Circuit. The Central Trust Company appeared by their counsel, Hoadly, Johnston & Colston; the individual trustee, Thomas A. Hendricks, appeared by one Bell as counsel. Judge Drummond appointed Edward E. Dwight, receiver.

As the road, although one corporation, was made up of several minor corporations which had placed mortgages upon their respective roads, these several mortgages were to be foreclosed. The record as it now appears in court relating to part of the road only is necessarily very imperfect, for much of what took place that is material to the situation took place in the Ohio Circuit. Therefore the situation is not as stated in the appellant's brief, or as that brief would lead the Court to infer.

Dwight was appointed receiver by Judge Drummond on Aug. 1, 1883. He was immediately confirmed in the Ohio Circuit. On the eleventh day of August, 1883, the Central Trust Company filed a bill in equity (Record, pages 20, 21) asking that a separate receiver be appointed for the Cincinnati Northern Division, and the Spring Grove, Avondale, and Cincinnati Division, both being in the Ohio Circuit. On the twelfth day of September Dwight as receiver filed a petition before Judge Drummond stating that the purpose of the bill above referred to was to separate those two roads from the rest, and thereby break up the system, as appears by said petition. (Record, pages 19–22.) It does not appear by this record what took place in the Ohio Circuit as to that

petition, but it does appear that on the twenty-second day of November, 1883, Dwight, the receiver, directed the following note to Judge Drummond: —

"*Dear Sir*,— Inasmuch as it is claimed that I am the only obstacle in the way of a settlement of the existing trouble in the affairs of this railroad, I herewith tender my resignation as receiver, to take effect when your Honor shall see fit to act upon it.

"I desire to thank you for the kind consideration you have always shown me.

"Very respectfully,

"EDWARD E. DWIGHT."

Record, page 72.

His resignation was accepted on the 30th of November, and William J. Craig was appointed receiver, to take effect on Dec. 1. Now, it is evident, from the letter of Dwight, that something had occurred to call for his resignation. The fact is, that, as soon as Judge Baxter found that Dwight had filed his petition of Sept. 12, asking for an injunction restraining the Central Trust Company *et al.* from proceeding to separate the road by a separate receivership in Ohio, he regarded it as disrespectful to him, since it would amount to the exercise of primary jurisdiction by Judge Drummond in the Ohio Circuit.

Judge Baxter, therefore, peremptorily removed Dwight, and Judges Baxter and Drummond had for several weeks a very sharp correspondence. Craig was appointed receiver in Ohio, while Dwight still remained receiver in Illinois and Indiana until his resignation before referred to. Both receivers represented in a large measure the feelings that had been engendered between the two judges. Meanwhile, the rolling stock was scattered all over the road,

and any action was useless which did not apply to the whole road; and Judge Baxter would not recognize any order which Judge Drummond might pass relating to the road in the Ohio Circuit. Therefore, though repeated applications were made verbally to the Court for some order or ruling as to the rolling stock, for the first four months of the receivership nothing could be accomplished.

Finally, to prevent any greater waste of property, Mr. Dwight consented to resign, and Craig was appointed receiver over the whole road. Steps were at once taken to secure united action by the two Courts, for the purpose of having something done about the rolling stock, and other matters connected with the road, which sorely needed attention, and at last it was arranged by personal interviews of counsel with both the judges, to have a meeting at Indianapolis in the latter part of the winter, for the purpose of having some course or policy relating to the rolling stock agreed upon that should cover the whole road. All parties were notified, and Judges Drummond, Baxter, Woods, Welker, and Sage sat at a day fixed at Indianapolis. A whole day was devoted to the discussion of the rolling-stock question. The various counsel, representing the diverse interests in both circuits, appeared at that time, and all the class of claims that are set up in any of the briefs now before the Court were then presented orally to the Court, and argued. At the conclusion of the hearing, the Court announced in substance, though no record seems to have been made of it, that the rolling stock was necessary for the operation of the road, that they should not regard any act of the receiver as amounting to a conversion thereof, and, therefore, should not authorize the receiver to pay in full for the rolling stock, or at that time permit it to be removed from the road, but that in both circuits proper compensation

should be made for its use, and that concurrent orders would be passed relating to the matter. Following that, on April 11, 1884, Judges Drummond and Woods referred the Western Division to Gov. Cox, and in the order of reference recited as follows: —

"Application having been made to this Court at various times for the payment of divers amounts claimed to be due and owing to various persons, which amounts were claimed to be entitled to priority over the plaintiff herein, after hearing Mr. High and Mr. Da Costa, of counsel for certain owners of cars and equipments now in use by the receiver appointed herein, and on hearing Mr. T. E. Stillman for the plaintiff in opposition to such claims, and a suggestion being made that it be referred to a master to inquire and state as hereinafter set forth to the Court, it is now ordered that it be referred to J. D. Cox, as special master."

Report, page 127.

A similar order was passed by Judge Baxter. It is apparent from the terms of Gov. Cox's appointment, and from his report, that he sat as master upon the whole road. It is hardly to be presumed, and the Court may properly infer the contrary, that all parties would have appeared before him as master, and submitted the evidence which they did, and which is reported in the record, had it not been that there was some order passed or understanding had with the Court by which all parties understood that their rights were being determined. It is, therefore, apparent that, though in the record before the Court for some reason there is a paucity of papers filed during the early months of the receivership, it is not a necessary or a proper inference that there was any neglect by the receiver or the appellees

to appear constantly before the Court for instructions or for relief by the parties who represented or owned the rolling stock. The rolling stock being scattered over the whole road, and the car that was in the Ohio Circuit one day being in the Indiana Circuit the next, and *vice versa*, and the contracts relating to the rolling stock having been made or assumed by the corporation as a whole, until the Courts could agree to co-operate it was impossible to get anything done, and that was in no manner the fault of the parties owning or representing the rolling stock. It may, therefore, be said that no solution was possible as properly representing the liabilities of the road and the relative rights of the various parties until Gov. Cox had filed his report, which was done on July 17, 1884, — almost one year from the date the receiver was first appointed.

Whether the operation of the road would or would not prove profitable was a question which depended upon many things. How far the unfortunate result was due to the differences of opinion between the several judges, to the controversies between the two receivers, and to the difficulties which grew out of such a state of things, no one can fully say, but that it materially impeded the successful operation of the road there can be no doubt. Receiver Craig was accountable to two judges, one of whom was naturally disposed to watch with great care and, possibly, suspicion all his acts, and when Judge Gresham succeeded Judge Drummond in the latter part of the case, he too became dissatisfied with Craig and appointed McNulta in his place.

This preliminary statement having been made, the points made by counsel for the appellant will be examined more in detail. The case presented in their brief seems to be : —

I.

The appellees were entitled to no compensation because,

a. They voluntarily left their property in the hands of the receiver after default in payment of interest on bonds, and also interest on car trusts.

b. They made no demand of possession.

c. They made no declaration of forfeiture.

d. They made no contracts with receiver or Court.

e. The appellees' rolling stock was not necessary in the winding up of the insolvent system.

f. The consolidated road never earned current operating expenses.

g. No earnings were diverted prior to the receivership.

h. The road did not earn operating expenses during receivership.

i No earnings were diverted during receivership.

j. The use of the equipment added nothing to the value of road sold, and did not increase the fund for the bondholders.

The reasons thus given for making no allowance whatever to the appellees may be grouped under three heads, *a* to *d* inclusive, *e*, and *f* to *j* inclusive, as follows: —

1. Nature of the possession of the rolling stock by the receivers and the attitude of the bondholders, the owners of the rolling stock, the Court and the receivers.

2. The necessity of the use of the rolling stock by the receivers.

3. The earnings of the road, the use made of such earnings, if any, and the value of the system as affected by the use of the rolling stock.

II.

If the appellees were entitled to anything, the amount allowed was erroneous, because,

a. It included the period of the Dwight receivership, that is from Aug. 1, 1883, to Dec. 1, 1883.

b. The rentals allowed were not based on mileage earnings.

I.

1.

Nature of the possession of the rolling stock by the receivers, and the attitude of the bondholders, the owners of the rolling stock, the Court and the receivers.

In the first place, we must call attention again to the fact, and emphasize it, that the bondholders represented by the appellant herein were, through their trustees, parties to this litigation from the very beginning. The Central Trust Company and Thomas A. Hendricks, being such trustees of all the mortgages represented by the appellant, appeared respectively on Aug. 1 and 2, 1883. (Record, pages 12 and 16.) The attempt made in the brief in behalf of the appellant to disclaim all responsibility for the proceedings until the committees of bondholders intervened cannot be allowed. If the bondholders were dissatisfied with the conduct of their trustees, they were at liberty to take the control of affairs from them; but until this was done the acts and omissions of the trustees were and are as effective and binding as if made by each individual bondholder.

The decree appointing the first receiver, recites: "said Toledo, Cincinnati & St. Louis Railroad Company assenting thereto, and the said Central Trust Company of New York not objecting thereto" (Record, page 14); and the appearance of Thomas A. Hendricks is as follows: "Comes now also Thomas A. Hendricks, trustee, one of the defendants in the above-entitled cause, by R. C. Bell, his solicitor, and waives the issue and service of process, and enters his

appearance herein, and does not object nor consent to the appointment of a receiver."

The decree appointing the first receiver was thus practically assented to by all parties interested, no objection being made.

The decree provides, among other things: "the said receiver is hereby clothed with all the authority and rights usually given to a receiver by courts of equity to take charge of, care for and operate a railroad."

Record, page 15.

So much as to the beginning and general scope of the receivership. Now, it is continually asserted in the brief for the appellant that there was no demand of possession by the appellees, no declaration of forfeiture, no contracts with the receiver or court, and no attempts made to effect any, but that, on the contrary, the rolling stock was voluntarily left in the possession of the receiver. It is, for the most part, true that the intervening petitions of the owners of rolling stock were not filed until the dates set forth in the appellant's brief. The implication that the questions of compensation for the use of rolling stock was then first presented to the Court is by no means true as appears from the preliminary statement in this brief. At the outset the question was presented orally in court, and the Court intimated, as already stated, that a just compensation should be paid to the owners of rolling stock, and that they would not be allowed to seize possession at once, and thereby embarrass the receiver in operating the railroad. No formal entry of this appears in the record, but the order of reference of April 11, 1884 indicates the fact: "Application having been made to this Court *at various times* for the payment of divers amounts claimed to be due and owing to various

persons, which amounts were claimed to be entitled to priority over the plaintiff herein (The Central Trust Company), after hearing Mr. High and Mr. Da Costa, of counsel for certain owners of cars and equipment now in use by the receiver appointed herein, and *on hearing Mr. T. E. Stillman for the plaintiff in opposition to such claims*, and a suggestion being made that it be referred to a master to inquire and state as hereinafter set forth to the Court, it is now ordered that it be referred to J. D. Cox as special master."

Record, p. 127.

Among other questions thus referred to Governor Cox were inquiries as to the amount of rolling stock owned by the Toledo, Cincinnati & St. Louis Railroad Company, and by its component parts, the amount of rolling stock which the receiver has had in his possession and use, the propriety or necessity of continued use of any part of it, and what would be a fair compensation for the past and future use of such rolling stock, and what deterioration it had suffered between the time of its delivery and the appointment of the receiver, and what since his appointment.

It therefore appears by the record that at various times prior to April 11, 1884, application had been made to the Court for payment of rentals, and that on that date the whole subject was referred to a master. Neither the receiver nor the Court at the outset made a contract with the owners of rolling stock, because at first the judges in the two circuits were not unanimous, and there were two receivers, and united action was indispensable, and afterwards the Court wished inquiry and investigation through a master as to the necessity of the rolling stock, and also as to what were proper rentals. But in equity the position of the appellees should not be the worse on this account. An implied contract or understanding with

the Court to pay for the equipment if necessary for the conduct of the business of the road, a fair compensation, to be determined later, is not less binding than an express contract to pay a definite amount. And it is asserted unqualifiedly that from the beginning it was well understood, not only by the receivers but by the Court, that it would be impossible to operate the railroad without the appellees' rolling stock, that the receiver was using such rolling stock, and that the appellees were expecting to be paid for such use.

In the case of *Myer* v. *Car Company*, 102 U. S. 1, there was no express contract with the Court or receiver.

The brief for the appellant is slightly inaccurate in stating in regard to the equipment represented by the American Loan and Trust Company : —

"No intervening petition concerning this equipment was filed by the American Loan and Trust Company until June 27, 1884." (Page 19.) It is true that the principal petition was filed on that day, but as to a portion of the equipment, an intervening petition was filed March 13, 1884.

Record, p. 112.

The statement, in the same brief, to be the effect that no demand for their property had ever been made by the appellees, is also put too strongly. The decree made by the Court on Dec. 11, 1884, shows that one of the questions argued had been whether there had been such a demand and refusal as to amount to a conversion on the part of the receiver. (Record, p. 301.) Such a question could certainly not have arisen if no demand whatever had been made.

Too sweeping language is also used at the bottom of p. 84 and elsewhere in the same brief, to the effect that "these appellees originally based themselves upon the proposition

that the Court and its receivers would be obliged to specifically perform their contracts of conditional purchase and sale. They left their equipment in the possession of the receivers, relying upon the theory of specific performance of their contracts." While we are not aware that an endeavor to sell their property to the receivers would be a bar to compensation for the use thereof, yet, as a matter of fact, an examination of the intervening petitions of the American Loan and Trust Company and of E. B. Phillips, trustee, will show that they prayed (1) for the return of their rolling stock (2), for a reasonable compensation for its use during the receivership, or for such time prior thereto as the Court might hold them entitled to compensation; and that they did not pray for specific performance at all – then or at any time.

Record, pp. 182, 186, 294, 296.

The terms of the order of reference, made by the Court April 11, 1884, show that the question of reasonable compensation for use of the property during the receivership had already been presented.

Record, p. 127.

The attitude of these appellees has therefore been as consistent throughout the litigation as could be asked.

2

The necessity of the use of the rolling stock by the receivers.

It would, of course, not have been necessary to use the appellees' equipment if the road had been sold immediately. But, in the first place, this could not have been done in the

nature of things. Long hearings before masters were necessary to determine how the road stood, what obligations existed against it, what property it owned, what the respective mortgages covered, etc. In the second place, as we have seen, the trustees of the bondholders now represented by the appellant practically consented to the decree of the Court, appointing the first receiver, and further, every one of the three bills filed by the bondholders prays for the appointment of a receiver with the usual powers of receivers of railroads. It was, therefore, necessary, and also agreed by all parties, that there should be a receiver with the usual powers of receivers of railroads, that is, with power to operate the railroad. Now, it is asserted confidently that this could not have been done without using the rolling stock of these appellees. Special Master Cox enumerates the rolling stock belonging to the various branches of the system. (Record, pages 206–208.) On page 208 of the Record, headings 6 and 7, is enumerated all the rolling stock belonging to the Toledo, Delphos & Burlington Railroad, which extended from Toledo to Frankfort, Indiana, about one half the distance from Toledo to East St. Louis, and to the Toledo, Cincinnati & St. Louis (in Indiana and Illinois), which composed the remaining half of the main line, extending from Frankfort to East St. Louis. These two roads together constituted the main line from Toledo, Ohio, to East St. Louis, Illinois, and are the only parts of the system involved in this appeal. The rolling stock thus enumerated is as follows: —

	Toledo, Delphos & Burlington Railroad.	Toledo, Cincinnati & St. Louis Railroad.
Locomotives	11	1
Passenger coaches	4	
Combination passenger and baggage car,	1	
Cabooses	4	1
Box cars	64	
Coal cars	82	
Flat cars	126	
Stock cars	8	
Extra narrow-gauge trucks . . .	4	

It thus appears that this was all the rolling stock belonging to the railroad extending from Toledo to East St. Louis, a distance of nearly five hundred miles. And that of this, one locomotive and one caboose alone belonged to the western half. Comment is unnecessary. The Court will not need the testimony of experts as to the possibility of operating a railroad of nearly five hundred miles, with an equipment of four passenger coaches, or twelve locomotives, or as to the possibility of operating the line from Frankfort to East St. Louis with one locomotive and one caboose. Even to run one train each way — mixed freight and passenger — daily, except Sundays, it was necessary, as stated in the brief for the appellant, to hire rolling stock.

No further argument is needed to show that in order to operate the road, as prayed for in the bills, not only of Braman but of the Central Trust Company, and as decreed by the Court, it was necessary to use the rolling stock of these appellees, — not simply desirable or convenient, but absolutely necessary in the most literal sense, for it will be remembered that this system, being the only important narrow-gauge system in the country, could not without much delay have procured other rolling stock than that of the

appellees, and having no narrow-gauge connections could not, after the custom of some railroads with insufficient equipment, make use of the rolling stock of connecting lines received in the course of business. See report of Special Master Cox, Record, page 212.

3.

The earnings of the road, the use made of such earnings, if any, and the value of the system as affected by the use of the rolling stock.

We readily concede that the road never, after the consolidation, made any net earnings, and that no earnings were diverted from payment of operating expenses either before or during the receivership. Something has been said as to some reasons for this in the preliminary statement. Whether the use of the rolling stock, by enabling the road to be preserved as a going concern, added anything to the value of the property or to the price paid for it, it is impossible to say. We shall not emulate the positiveness of the brief for the appellant by stating that there was such increase of value or price. We will, however, say this, that the equipment of the appellees was used by the Court and its officers with the *bona fide* intention to preserve the property and make it productive for the benefit of the bondholders, that the bondholders, through their trustees, if they did not consent, did not object to such use, and indeed actually requested a receivership, which necessarily involved such use, and that, if an attempt to make the property productive fails, bondholders who, through their trustees, have throughout the litigation been parties, and had abundant opportunities to be heard on all questions relating to the management of the road, cannot object that the reasonable expenses of the attempt shall be charged upon the property.

If the attempt is successful, it is the bondholders who profit. The owners of rolling stock would in no event be entitled to more than a reasonable compensation for the use of their property. The game is played for the benefit of the bondholders: they take the prize if it is won; if it is not, it is just that they should bear the loss.

A fundamental error, cropping out frequently in the appellant's brief, is the assumption that the propriety of the receivership and of all the acts of the receivers is to be judged from the standpoint of the present; whereas, obviously, the true test is not did the receiver make a profit or even has the property been benefited, but was it fair to suppose at the time action was taken that such action, so far as could be seen, was probably the best, and the most likely to produce a profit, or preserve what remained of the propety. Of this, the best evidence the Appellate Court can have is that what was done was after due consideration by the court below with all the facts before it and with all parties interested represented by counsel appearing and arguing.

II.

The points made in the brief for the appellant, which, we have grouped under this head, do not demand extended treatment.

a. *The Inclusion of the Period of the Dwight Receivership.*

As to this, we refer to page 21 of our principal brief. The adjudications there referred to are conclusive.

b. *The Rentals allowed were not based on Mileage Earnings.*

As a preliminary, it is to be said to the argument on this point that we fail to see that, simply because cases Nos. 252

and 1537 are to be argued together for the convenience of the appellant, it is proper or allowable to introduce as facts into this case matter taken from the record of the other case, — a record we have never even seen.

But, waiving this, upon the merits of the question the same error is involved in the argument here as was noticed under the previous heading, — that is, the argument is in effect to make the compensation of the appellees contingent upon the earnings or profits made, or in other words, upon the success of the attempt to make the property remunerative. If such an arrangement can be made beforehand, it is very well, but to lay down the rule that such is the proper, universal and only true measure of compensation could only result in making it impossible for a receiver to operate a road. If he attempts to buy on such terms, owners will not sell rolling stock, rails, coal or anything else. These appellees would certainly never have left their property in the hands of a receiver on any such understanding. Their understanding was that they were to receive a reasonable rental, to be fixed by the Court after reference to the master; and this understanding was justified by the attitude of the parties throughout the controversy, as has already been shown.

HENRY D. HYDE,
SAMUEL WILLISTON,

Of counsel for the AMERICAN LOAN AND TRUST COMPANY *and* E. B. PHILLIPS, *Trustee.*

Three bills prayed for receiver & operate road
Record pp. 11, 34, 151

Four applications were made for delivery of rolling stock and payment for use; June 27/84 p. 127; Dec 1/84 pp 292-301, July 30/85 pp 443, 444, Nov. 9/85 p. 460

See also pp. 29, 33, 129, 130, 391-393, 525, 556

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 252.

SYLVESTER H. KNEELAND, Appellant, vs. THE AMERICAN LOAN AND TRUST COMPANY OF BOSTON, THE GRANT LOCOMOTIVE WORKS ET AL., Appellees.	Appeal from the Circuit Court of the United States for the District of Indiana.

Brief and Argument in behalf of R. S. Grant, and The Grant Locomotive Works, Appellees.

STATEMENT.

The learned counsel for the appellant omits from his statements and brief, several vital facts which lie at the foundation of the rights of the parties to this litigation. Their omission renders it possible for the counsel himself to entirely misconceive and misstate, as he does, the real questions presented for decision, and thus to lead the Court itself, following the mazes of his brief, far astray from the plain and straight path to justice between the parties.

The objection is not to the history of the creation of the consolidated corporation, the Toledo, St. Louis and

Cincinnati Railroad Company, the chief defendant in the original cause, nor to the account of the several constituent companies composing it. The successive steps in their development are given correctly enough. But it is when we come to look at the particular details of the bonded debt of said company and its constituents, to the precise dates of defaults in interest, and consequent insolvency antecedent to the appointment of Edward E. Dwight, on the first day of August, 1883, to be Receiver of the entire system, it is then that the omissions of the counsel become notable and material. Such omissions become vital in the incidents of the Braman bill, in which said Receiver was appointed, and in which, *with the full knowledge and approval of the bondholders and their trustees*, such direction was given to the litigation as entirely changes the case from that stated by Mr. Butler, and shifts the responsibility for the situation from the appellees to the appellant and his associate bondholders.

Over against the tiresome if not "damnable iteration" and imputations of neglect, if not of positive wrongdoing, against the appellees, and in response to the misleading questions of opposing counsel, which find no support in the facts of record, it is my desire and the object of this brief to set the many acts of wrongdoing, both of omission and commission on the part of the bondholders; and thereupon to challenge the attention of the Court, in the light of approved precedents, to the right of the appellees generally, and of my clients in particular, to be preferred to the bondholders in the distribution of the proceeds of sale of the mortgaged premises.

POINTS OF FACT.

I. AT THE DATE OF THE FILING OF THE BRAMAN BILL AND THE APPOINTMENT OF THE RECEIVER, NOTWITHSTAND-

ING CONTINUED DEFAULTS IN INTEREST FROM THE VERY BEGINNING, AND IN SOME CASES FOR TWO YEARS PRIOR TO SUCH FILING THE BONDHOLDERS AND THEIR TRUSTEES, WELL KNOWING ITS INSOLVENCY, SUFFERED THE DEFENDANT, THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, OR ITS CONSTITUENTS, TO OPERATE THEIR RAILWAY OR RAILWAYS AND TO CONTINUE, NOT ONLY UNCHALLENGED BY THEM, BUT WITH THEIR CONSENT AND APPROBATION TO INCUR OBLIGATIONS IN THAT BEHALF TO MY CLIENTS, ESPECIALLY, AMONG MANY OTHERS.

It clearly appears from the dates of the several mortgages of the constituent companies, carefully described in the Braman suit, and from the interest shown therein to be due, that the older and completed constituent railways of the system had earned and paid their respective fixed charges. But during the two years next prior to the receivership, with the knowledge if not the consent of the bondholders, the current earnings of such completed railways had been devoted and applied to the improvement and upbuilding of the extensions which had been decided upon as essential to the full development of the consolidated railway. It is so expressly stated by certain of the bondholders concerned herein (page 12).

The schedule of overdue first mortgage interest set out in the Braman bill shows that defaults had been running at the date of the filing of the bill, August 1, 1883, through more than three successive half yearly periods, on the Toledo, Delphos and Burlington main line mortgage. The amount of the mortgage was $1,250,000. The interest then due, inclusive of $27,000 overdue and unpaid coupons *which had been funded*, was $143,370.

On the Terminal Trust Mortgage, included in the main line reorganization scheme of the appellant, no interest had been paid for two years prior to the appointment of the Receiver. The amount of the mort-

gage was $250,000. The interest due and in default was $30,000.

On the Toledo, Cincinnati and St. Louis mortgage for $3,000,000, the interest in default and unpaid was $350,880, or for more than three successive half-yearly periods.

Nearly all the Ohio divisions had been in default for more than one year and the total interest on the entire system due and unpaid was $994,693.50, of which amonut $178,110 had been funded by the bondholders by the issue and acceptance of deferred bonds bearing six per cent. interest, leaving $816,583.50 which had been long in default and overdue (pages 7 and 9). The fact of these successive defaults and the amount thereof, as above stated, and as carefully set out in the Braman bill, appear in the sworn answer of the Toledo, Cincinnati and St. Louis Company (pages 92 and 96), and is also admitted in Mr. Butler's brief (page 11).

By reason of such continued defaults and under the express terms of the Toledo, Delphos and Burlington mortgage, and of others, the bondholders through their Trustee had full right at any time upon default in interest, and after it had remained in arrears for six months after demand, to enter into possession of the railway—to use, operate and enjoy the same; and upon any six months' default the trustee, after demand, with or without such entry, had the right to sell the said railway as an entirety, on sixty days' notice.

It was, also, made the duty of the Company, upon demand, to forthwith surrender to such Trustee the peaceable possession of its entire railway property, real and personal. (Pages 27 and 28.)

In the face of these repeated defaults and of the undoubted right of the bondholders and trustees, at once, thereupon to arrest the mismanagement of the Company, to cut off its power of contracting liabilities, to general creditors and to take the management of its

affairs into their own hands, the record will be searched in vain for any evidence of a single step or movement on the part of the bondholders in any of these directions. They forbore to press any of their rights when by doing so they would have saved hundreds of thousands of dollars to my clients and others whom they now seek to thrust into the position of mere, general creditors, even as to the rentals due from the Receiver. By funding their interest and forbearing to foreclose, they upheld the credit of the Company and made opportunity for it to secure the contracts with my clients.

These contracts, whether contracts of lease, as we insist, or contracts of conditional sale, as decided in the Court below, are two in number and are as follows :

On August 1, 1882, the appellee, the Grant Locomotive Works, of Paterson, New Jersey, leased, in terms, to the Toledo, Cincinnati and St. Louis Railroad Company ten consolidated locomotives. They constitute what is described in the lease and as scheduled in the Braman bill, "T., C. & St. L. R.R. Co.'s 6% Car Trust, Series C." They were manufactured by the said appellee, were numbered from 57 to 66, inclusive, and were delivered to the Railroad Company in complete order in the Summer of 1882. The prices were fair and reasonable, as values then prevailed, and the engines were continuously in active use on the Ohio Divisions of the system down to the appointment of the receiver and long afterwards. None of them were ever used on the main line, so called, from Toledo to East St. Louis, and the company made no default in any of the conditions of the contract until after the receiver was appointed under the Braman bill (pages 752 to 778).

On March 24th, 1883, the appellee, R. S. Grant, of New York, president of the said locomotive works, leased, in terms, to the Cincinnati Northern Railway Company ten other and lighter locomotives. They consti-

tute what is described in the lease and as scheduled in the Braman bill, "Cincinnati Northern Car Trust, Series F." These locomotives were also manufactured by the Grant Locomotive Works, were numbered from 67 to 76 inclusive, and were, in the Spring of 1883, duly delivered to the said railway in perfect running order and good condition. They were unusually well-built engines, put up to the particular order and specifications of the railway company, and at prices which were in reality below the prevailing market. On the delivery the lessor received from the lessee company $18,558.97 on the contract, and there was no default in any of the conditions or stipulations of the contract until after the Receiver took possession August 1st, 1883.

Soon after the execution of the lease, the Cincinnati Northern Railway Company, May 5, 1883, consolidated with the said Toledo, Cincinnati and St. Louis Railroad Company, and thereupon, by operation of law, the consolidated company assumed and became responsible for the obligations and covenants of the contract.

Four of these engines were placed in use on the Ohio Divisions and the other six, 69, 70, 71, 74, 75 and 76, were sent to the main line, and there fell under the jurisdiction of his Honor Judge Drummond (page 752 to 778).

It appears from the testimony in the record that these last ten were among the best engines in the possession of the company, and constituted, with the first ten, more than a fifth of the whole motive power, the earning power, of the company and the receivership.

At the time these contracts were made the narrow guage system was reaching its highest point of development and it was not brought into discredit until about the time of the appointment of the receiver for this railway. Indeed it was that appointment and the consequent insolvency of the Toledo, Cincinnati and St. Louis Railroad Company that was an important factor in such discrediting and in the consequent de-

preciation of the value in the market of narrow guage equipment (pages 211 and 754–755).

In this apparent buoyant condition of narrow guage affairs, with the whole market before him where to sell, it is absurd to claim that Mr. Grant would have delivered his engines to a hopelessly bankrupt concern if he had any appreciation whatever of the actual state of the company's finances.

It was under these circumstances as they affect the relative good faith of the company, the bondholders and these appellees, that these contracts were entered into, under which the company, substantially as the agent of the bondholders, secured possession of the twenty locomotives now under consideration.

Of a part with the antecedent facts was the appointment of a receiver for the entire system on the 2d day of August, 1883, at the suit of Grenville D. Braman, an alleged "unsecured judgment creditor."

II. THE SO-CALLED BRAMAN BILL WAS NOT SO MUCH A CREDITOR'S BILL—IT WAS THAT ONLY IN NAME—AS IT WAS A BONDHOLDERS' BILL. THE PROCEEDINGS THEREUNDER FOR THE APPOINTMENT OF A RECEIVER WERE COLLUSIVE AS BETWEEN BRAMAN, THE COMPANY AND THE BONDHOLDERS AND WERE INSPIRED BY AND WHOLLY IN THE INTEREST OF THE BONDHOLDERS.

For the unqualified truth of this position the attention of the Court is called to the following statements from the record.

On August 1st, 1883, the said Braman appeared before his Honor Judge WOODS at Indianapolis and filed his bill of complaint alleging, among other things, that he was a citizen of Boston and had obtained a judgment two days before, July 30th, 1883, against the Toledo, Cincinnati and St. Louis Railroad Company for

$5,627.70, in the Common Pleas Court of Montgomery County, Ohio, upon which, in the meantime, execution had been issued and returned no property found.

Then follows a careful description of the entire consolidated system, schedules of its constituent bonded debt, its equipment bonds and obligations, its overdue interest account as above set out, a statement of insolvency and the necessity for the continued operation of the property as a whole, with the view to its ultimate sale as a whole. The bill then further states:

"Your complainant alleges that by the terms of "each and all of said mortgages the Central Trust "Company of New York, a corporation organized and "existing under the laws of the State of New York for "this and like purposes, was made and is Trustee for "the protection of the *cestui que trusts*, being the hold-"ers of said bonds, except that by the terms of said "mortgage on a portion of the line of said railway, ex-"tending from Frankfort, Indiana, to East St. Louis, "Illinois, said Central Trust Company of New York and "Thomas A. Hendricks, of the City of Indianapolis and "State of Indiana, were made and are such co-Trustees, "and they are accordingly made co-defendants herein "*for the protection of the interests of said bondholders.*"

In conclusion, a Receiver was prayed, with orders to take possession of *and protect the railway*, with a view to its ultimate sale as an entirety.

Writs of subpœna were prayed against the company and the said Trustees (pages 2 to 11).

But it was not necessary to issue such writs.

At the same time and place, the voluntary appearance of the company was entered by its solicitor, and issue and service of process were waived.

The voluntary appearance of the Central Trust Company, with waiver of service and process, was also at once entered by its solicitors, Hoadly, Johnson & Colston.

And some of the bondholders came also, in the persons of Charles R. Batt, Dana and Mansfield and others of Boston, and by counsel intervened before Judge WOODS in the Braman suit, and, setting up the bonded interests of the constituent, the Iron Railroad, participated in the application for the Receiver, asking only the proper reservations of the separate rights of that property. From their petition, filed at the time, it appears that the net earnings of that part of the system had been sufficient to pay the interest on its bonded debt, but no interest had ever been paid and the earnings had been used, presumably with the consent of the bondholders, for the improvement of the entire system (p. 12).

On the next day, the company, the trustee and complainant Braman appeared before his Honor, Judge DRUMMOND, in Chambers, at Chicago, and the company consenting and the Central Trust Company not objecting, Edward E. Dwight, one of the company's officials, was appointed Receiver of all the railway property belonging to the system in the District of Indiana.

Thereupon, at the same time and place, the other trustee, Thomas A. Hendricks, also entered his appearance, waiving issue and service of process, "and does not object nor consent to the appointment of a Receiver" (pp. 14 and 16).

In like manner the Central Trust Company entered its appearance in the Federal Courts at Springfield, Illinois, and Toledo, Ohio, wherein the bill of said Braman was also filed, and was present, by counsel, at each application of said Braman for the appointment of a receiver, and made no objection to such application or to the appointment of Dwight.

In its terms, as was to be expected, the order appointing Dwight receiver was protective of the bondholders' rights, but contained the provision usual in all of that venerable Judge's orders for the appointment of receivers, directing the payment of debts due

for wages and material and supplies incurred in the operation and maintenance of the property during the six months next prior (page 16).

It expressly provided, after directing an accounting of funds applicable to the payment of bonded and other interest, "that any party in interest shall have leave to "apply to this Court at any time within ninety days from "this order to move for a change of the receiver hereby "appointed and the substitution of another in his "place" (page 16).

Under this and like orders entered at Springfield, and at Toledo on ancillary proceedings before Judge WELKER, Dwight at once, as receiver, took possession of the entire consolidated system, including that portion of it in the Southern District of Ohio. The traveling triumvirate Braman, the company and the trustee made the rounds in happy accord until the receiver of their choice had been placed in possession of the whole system, including equipment, thus making it impossible for any of the *bona fide* unsecured creditors of the company to levy executions or otherwise interfere with the operations of the railway as a whole. Then this disinterested "unsecured judgment creditor" having effectually defeated his own claim, in his zeal for the protection of the company and the bondholders, lags a little longer, until the trustees and bondholders of the many mortgages had prepared their bills and considered their plans for reorganization, and then having become quite superflous, in the sixth circuit was summarily dismissed from the stage (pp. 767, 768).

But in the seventh his irregular existence, as an aid to the bondholders, was gradually superseded by the regular proceedings, in the name of the trustee, for the foreclosure of the respective mortgages on the main line (pp. 72 and 73).

On November 27, 1884, upon the express motion of Thomas E. Stillman, solicitor for the Central Trust Company, made in cause No. 7706, at Indianapolis, the

receivership created in the Braman suit August 2, 1883, was "extended over and made to apply to the premises and property sought to be foreclosed" in said No. 7706.

Thereafter the Braman suit, although not dismissed, as in Ohio, yet ceased to be vital. It had been from the first a mere "stop gap" for the bondholders, and having served its purpose was permitted to fade out peacefully in the house of its friends.

It did not, however, fare so well before Judge Baxter. On having his attention called to the Braman bill, and the appointment of Dwight as receiver therein by his Honor Judge Drummond, and by his Honor Judge Welker, at Toledo, Judge Baxter almost at once announced his purpose to dismiss the suit pending at Toledo, to discharge the receiver and turn the railroad property in Ohio back to the possession of the company. In spite of a conference between the two Circuit Judges at Toledo, September 29th, 1883, Judge BAXTER persisted in his most determined opposition to the Braman suit, decided that Braman was not entitled to the appointment of a receiver and announced that the railroad property would be remanded to the possession of the Company on October 20th, unless, in the meantime, proper application should be made on the part of the bondholders for a receiver (p. 767).

It is unnecessary to say that such a bill was promptly filed and as Mr. Dwight has been so unfortunate as to fail in securing the confidence of Judge BAXTER he was not appointed in the trustee suit, but W. J. Craig was, and on November 1st he relieved Mr. Dwight of the possession of the railway which he had been permitted to retain until Craig could qualify, notwithstanding the Braman bill itself had already been dismissed (p. 768).

He held on longer in the Seventh Circuit and did not resign for nearly a month afterwards, and then only, as is well known, because of the continued opposition of

Judge BAXTER, and the desire of all the parties to restore harmony between the circuits and to secure a harmonious administration of the property in all its parts.

At no time was there the slightest opposition on the part of the bondholders to Mr. Dwight. It is true he sought to defeat the announced hostile purpose of Judge BAXTER by asking Judge DRUMMOND to enjoin the Central Trust Company from moving in Judge BAXTER'S Court for a separate receiver for the property in the Southern District of Ohio, where the Braman bill had not been filed, but it came to naught and only intensified the powerful official opposition it was intended to nullify (pages 19 and 72).

Such is the true, if somewhat remarkable, history of this important initial suit and receivership. Mr. Butler's statements, at page 11 of his Brief, and 26 of his Reply Brief, utterly fail to give this Court any just conception of the real significance of that litigation. Indeed he treats it and asks the Court to treat it as a matter quite apart from the bondholders, and unacceptable, if not really hostile, to them. Whereas, as I trust I have fairly shown, it was from start to finish and through and through a bondholders' movement.

It is in vain, therefore, that counsel for the appellant seeks to evade the just responsibility that attaches to the bondholders in respect of that suit and its initial acts and orders, and by which the appellant, as a late comer, *pendente lite*, and as purchaser is, in justice, bound.

Equally futile should be his effort to bring this Court to exclude from payment out of the proceeds of the sale of the mortgaged premises the just debts of Receiver Dwight. Dwight, even more than Craig, was the creation of the bondholders. But for the opposition of Judge BAXTER to the former it is reasonably certain he would have continued receiver to the end. The filing of the independent suits for foreclosure had, it is respectfully urged, no reference whatever either to the fact that

Braman was an "unsecured judgment creditor" or that Dwight was unacceptable to the bondholders.

No one having the slightest appreciation of the practice in such cases would ever, for one moment, suppose that the venerable Judge of the Seventh Circuit, now retired, would have appointed a receiver on the Braman bill if he had not been thoroughly assured of the desire of the bondholders that such an order should issue, and that the same was necessary for their protection.

III. NOT ONLY WERE THE BONDHOLDERS IN ACTIVE CO-OPERATION IN SECURING A RECEIVER UNDER THE BRAMAN BILL, BUT THEY CAUSED HIM TO BE ORDERED BY THE COURT TO SIEZE UPON AND HOLD IN POSSESSION FOR THEIR INTEREST AND PURPOSE, THE TWENTY ENGINES OF THESE APPELLEES, AND TO PERSIST FOR SEVENTEEN MONTHS IN THE DETENTION AND USE OF THE SAME AGAINST THE WILL OF THE SAID APPELLEES, AND IN THE FACE OF REPEATED DEMANDS FOR THEIR RETURN.

As we have seen, this unique "unsecured creditors' bill" contained, in addition to a full account of the bonded debt of the company, also a complete schedule of the equipment in active use upon it, with specific reference to the various equipment leases and trusts, and to those of these appellees among others (page 7).

Not content with praying for the protection of the bondholders and the company, he still further subordinated his own interests in the effort to protect the public. This occurs :

"Your complainant alleges that the public interests "and the interests of each and all of the owners, lien-"holders and creditors of said company will greatly "suffer should said line of railway cease to be oper-

" ated ; that the same cannot be operated without the " continued use thereon of said engines and cars, which " your complainant is informed and believes are likely " to be withdrawn if over-due payments are not soon " made as provided in said trust agreements, and which " said company is unable to pay " (page 10).

On this bill, thus filed and thus aided in its declared objects by the active co-operation of bondholders, trustees and company, the Court, in granting the receiver, specifically ordered him " to take possession of, maintain and operate the said railroad and premises described in said bill of complaint * * * its equipment, income and franchises, with all its appurtenances, as well as its lands and other premises, as fully described in said complaint, reference thereto for greater certainty is had and made."

Notwithstanding the Central Trust Company and its co-trustee Thomas A. Hendricks, with Batt, Dana, Mansfield and other bondholders continued as parties to said proceedings, it nowhere appears that they ever objected to or in any way, prior to January 1, 1885, sought to modify the above orders. The Court, out of abundant caution, gave them and all other parties in interest ninety days from the 2d day of August, 1883, in which to object to the Receiver and to move for a change, and it expressly reserved all questions not covered by the order for future consideration.

The ninety days past in the Seventh Circuit and they gave no sign of discontent.

November 27th came, bringing with it the voluntary resignation of Receiver Dwight, and it was then Thomas E. Stillman, solicitor for said Central Trust Company, who came forward to ratify and approve all that had been done in moving the Court, as has been shown, that it be ordered " that the receivership already existing under the order (of August 2d, 1883) heretofore entered be extended over and made to apply to the

premises and property sought to be foreclosed in this action" (by the Trustee and bondholders, No. 7706).

On the next day in the Braman suit itself No. 7672, before the Hon. Thomas A. Drummond and the Hon. William A. Woods, the resignation of Dwight, Receiver, was accepted and, no one objecting, Craig was appointed receiver "in his place and stead."

On the same day and at the same time before the said Judges, in cause No. 7706, on motion of Thomas E. Stillman and Edward Colston, solicitors for the trustee and bondholders, Craig was appointed receiver "in the place and stead of Dwight, with the same duties, among which was to secure possession from Dwight of all the property and assets of the defendant companies, including of course, equipment (pp. 72, 73).

It was not until January 1, 1885, seventeen months after the initial receivership, after the appellant had come into the litigation, and after a change of gauge had been decided upon, that objection was heard on the part of any bondholder to the retention, "by force if necessary," of the engines of these appellees (pp. 321 and 211).

Meanwhile the Court below had fixed rentals and had twice reduced the amounts allowed by Master Cox, without any objection whatever from trustees or bondholders or appellant to the *use* of the engines belonging to these appellees, and without the expression of any dissatisfaction whatever with the action of the Court in its administration of the railway, save and except alone in the matter of the *rates* of rentals allowed (pages 222, 300, 435).

Trustee Hendricks did not at any time except even to the original allowances of Cox (222, 435 and 437).

It follows that never having excepted to the use of the engines, nor to the orders of the Court below in fixing the rates of rental on the report of Special Master Cox, the bondholders, their trustees and assignees are now estopped from doing so. They cannot,

in this Court, for the first time raise objections to the use of the engines by Dwight and his successors, or to the allowance of the rentals fixed by the Court in that behalf.

But the claims of these appellees, R. S. Grant and the Grant Locomotive Works, stand upon a different and even far stronger right, in equity, than that presented by the foregoing considerations based upon the direct responsibility of the bondholders for the seizure and detention of their engines.

It is upon the fact stated above, and which it now remains to establish from the record, that such detention and use by the bondholders and their receivers of the engines belonging to these appellees was against the will of the latter and in the face of their repeated demands upon Courts and Receivers for the return of their property.

It is to be noted at the outset that opposing counsel in his statement of the claims of these appellees does not specifically aver, as he does in the case of other claimants, that they made no demand for the return of their engines (page 24).

Such an averment would have been contrary to the plain facts of the record. Nevertheless he does include them in his general and sweeping deluge of errors, not once but thrice, as having been derelict in that important regard (pages 50, 53, 54).

The exact contrary is true.

Upon reference to the leases or contracts, the substance of which are stated at pages 773 and 774, and which appear in full in cases 1277 and 1280 inclusive appealed from the Southern District of Ohio by the bondholders, and now, under advisement by this Court, upon motions to dismiss and affirm, it will be seen that certain payments to appellees, as lessors, fell due on the first and tenth days of August, 1883, respectively.

Prior thereto there had been no defaults or failures

on the part of the company, in any of the covenants of the respective contracts with these appellees.

But on these dates, a receiver having been meanwhile appointed, under circumstances now made familiar to the Court, and having entered at once into possession of the engines, defaults were permitted in the payments then falling due.

Almost immediately, and within ten days from such default, Mr. John R. Bullard, a reputable attorney of Boston, being thereunto fully authorized and directed by the appellees the Grant Locomotive Works and its Trustee the American Loan and Trust Company, and by the appellee R. S. Grant, proceeded to Toledo, Ohio, and their made explicit demand upon Edward E. Dwight, Receiver of the Toledo, Cincinnati and St. Louis Railway for the surrender of the possession of the twenty locomotives belonging to these appellees, for defaults in the stipulated payments due under the contracts.

But Dwight refused "*to surrender them and each of "them and stated that the engines were essential and "necessary to his management of the railroad as Re- "ceiver, and that he ought and would resist any "attempt on my (Bullard's) part to take posses- "sion of them; that he was willing to pay a "fair price for them, but he proposed to hold the "locomotives under all circumstances*" (page 752).

Thereupon Dwight and Bullard agreed upon a valuation for the purchase of the locomotives, which was the same as that fixed in the contracts and which, it is abundantly shown in the testimony of Grant, Evans, Genl. Wilson and others, in the Record (pages 753 to 765), was, as the market then stood, perfectly fair and reasonable.

As Bullard fully understood, the Receiver, as far as was within his power, became the owner of the locomotives at the agreed price. Steps were taken to

bring the matter to the attention of his Honor Judge DRUMMOND.

Afterwards on the 22d of August, 1883, the matter was formally brought before the Judge, and favorable assurances were made by him as regards the carrying out of the agreement (pages 752, 753).

It has been said, and it appears of record, that Mr. Bullard acted on the express employment of these appellees to make such demand for the return of their engines for defaults in payment (pages 752, 759).

On August 25th, 1883, Messrs. Bullard and Wilson presented a formal petition to his Honor, Judge Drummond, in behalf of appellee, R. S. Grant, setting out the contract of March 24th, 1883, in respect to engines 67 to 76 inclusive, showing the appointment of the Receiver, his entry into the possession of the railway, and the seizure and detention of the locomotives, the default in the stipulated payments, the use of six of the said locomotives in the operation of the railway between Toledo, Ohio, and East St. Louis, and the refusal of the Receiver to surrender the same notwithstanding the demand previously made. Then follows this averment:

"And your petitioner further shows that under said agreement, by reason of said default, your petitioner is entitled to the immediate possession of said six locomotives and tenders. * * * Wherefore your petitioner respectfully prays that said receiver may be ordered forthwith to surrender said six locomotives and tenders to your petitioners." And for general relief (page 773).

One week later, September 1, 1883, a petition on behalf of appellee, the Grant Locomotive Works, in all respects similar, except as it referred to the ten engines 57 to 66 inclusive, covered by the contract of August 1, 1882, was presented to the same Judge, and like prayer and demand were made for the surrender of the property (page 774).

On a hearing then had, the Receiver being represented

by counsel, and praying for the retention of the engines, the Judge announced that while he was strongly disinclined to issue Receiver's certificates for anything except labor he would do so if necessary, and that the Receiver must either assume the contracts of lease on equitable terms as to cash payment or surrender the locomotives in good condition with allowance for damages and with arrearages of rental by September 20th, following (page 766).

It has already appeared that, before the latter date, a sharp conflict of views not, however, relating to these matters, had arisen between the Circuit Judges of the 6th and 7th Circuits (page 767).

But the controversy delayed the promised settlement with the appellees, notwithstanding further conferences and progress with receiver and court, September 18th and October 1, 1883, respectively (page 767).

Afterwards, October 27th, 1883, when proper bills for foreclosure had been filed at Cincinnati, these appellees intervened therein and renewed their demands for the surrender of their locomotives or for payment for them, fourteen of them then being in use, on the divisions in that jurisdiction.

The sworn answers of the Receiver, W. J. Craig, were filed, in which he declared that the locomotives were indispensable to the proper operation of the railway in his hands, and prayed the Court to make such order as would enable him to retain such possession and at the same time protect the rights of the petitioners, these appellees.

November, 23, 1883, in the United States Court, at Cincinnati, his Honor Judge SAGE presiding, the same attorney who writes this brief was present for the petitioners, as was also Mr. Edgar M. Johnson, of counsel for the Central Trust Company, and thereupon the Court announced: "I understand from Mr. Foraker, "attorney for the Receiver, that these locomotives are "now in the operation of the railway, and that the Re-

" ceiver will ask the Court to retain them. That being " so, I will say now that they should be paid for either " by the issue of Receiver's certificates or in any speedier " way practicable " (p. 769).

Following this announcement from the bench, decrees were duly prepared covering the said fourteen locomotives, were mailed to the Judge, and telegrams were sent to Messrs. Hoadly, Johnson & Colston, counsel for the trustees, inviting attention to the inclosures to Judge Sage. His Honor was requested to submit the proposed decrees to the Receiver's counsel, Judge Foraker, which was done, and, after all parties in interest, including the Court, had had ample time to look into the matter, on December 22d, 1883, upon the consent in writing of the Receiver's counsel, the decrees heretofore submitted to this Court were finally entered (pages 769 to 772).

And thus in the due, orderly, open and honorable course of litigation the rights of these appellees as to fourteen out of twenty of their locomotives, were, as it was believed, determined and settled.

The decrees so entered embraced all of the " Series C " locomotives, and four of " Series F " then within the Southern District of Ohio, and secured the Receiver the possession and title, and were intended to secure the appellees the simple contract valuation, with interest and no more.

The record in this cause does not contain an account of the subsequent attempt on the part of his Honor Judge BAXTER after the decrees had been duly enrolled, and the lapse of a whole intervening term, upon his own motion, to vacate Judge SAGE's decrees.

But it does contain abundant evidence that these appellees through their present counsel always thereafter, down to this present, in all Courts, before all Masters, and to all Receivers, dealing with the property of these

appellees, never failed to assert their rights under the said decrees.

By protest, and most earnest and persistent, but fruitless opposition before Judge BAXTER himself.

By written protest before his Special Master Cox and by exceptions to his report (page 90).

By motions, petitions and ultimate hearing thereon before his Honor Judge JACKSON and Mr. Justice MATTHEWS, resulting in the annulling of Judge BAXTER's orders, and the affirmation of the continued force and validity of the decrees of December 22, 1883, and upon which last rulings, consonant with justice and the rights of the case, it will be seen the appellees continue to rely before this Court of last resort, as to the locomotives covered thereby.

As to the remaining six locomotives they continued in use by the receivers in the Seventh Circuit without any objection whatever from the bondholders, as has been seen, until January 1, 1885. It has appeared that petitions had been filed as early as August 25th in the Braman suit, at Springfield, Illinois, demanding their return. Owing to the facts stated above, change of Receivers and a final decision by the bondholders early in 1884, to change the gauge, but after the entry of the decrees by Judge SAGE in Ohio, it no longer seemed desirable to acquire title to the six engines, although, against the demand of the appellees, they were retained by the Court and continued in use until 1885.

On October 23, 1884, petitions were also filed in the foreclosure suits then pending at Indianapolis. Judge Drummond having retired and having been succeeded by Judge Gresham, an order was enterred consolidating the causes at Indianapolis which thence forward, as to the said railway property in the Seventh Circuit, became the seat of active litigation. The petitions last filed contained the same general averments as the first and set out the demand upon and the refusal of the receiver to surrender the same (pages 263 to 267).

Meanwhile the credit of the narrow gauge system had utterly broken down, and the market for the locomotives had greatly declined, if it had not disappeared. The engines themselves by bad usage, on a poor track, had been greatly depreciated in value, one of them had been completely wrecked, and it had been decided by the bondholders, or their speculative assignee, the appellant to change the gauge; then it was, and not till then, that it was finally resolved that the appellees could retake their property. (Page 753 to 765, 321 and 211).

Under these circumstances and in view of all the facts these appellees in filing their last said petitions no longer desired or sought the possession of their six remaining engines, or any of them, but prayed for their full value as fixed by the original contracts, and as was finally allowed by Judge JACKSON and the late Mr. Justice MATTHEWS.

To all reports of masters allowing rentals, and refusing to allow payment in full, at the contract price, proper exceptions were filed in the Court below, and objections were taken, at every step, to the rulings of that Court inconsistent with the contention of the appellees.

By full and specific exception to the report of Special Master Cox, made up by him in the sixth circuit, in the light of Judge BAXTER'S erroneous and void order, and filed in this cause (pp. 232–236).

By objection to the rulings of the Court below on said report and the exceptions thereto (p. 300).

By exceptions to the first report of Master in Chancery Fishback apportioning the rentals fixed by the Court below on the report of Cox, which exceptions, through no fault or neglect of counsel for these appellees, were omitted from the record (p. 528).

By objection to the ruling of the Court below on said report and the exceptions thereto, and by like exceptions to the second and final report of Fishback and by

objections to and appeal from the final decree of the said Court thereon (pp. 553 *et seq*).

By perfecting and bringing such independent appeal to this Court from said final decree, but which these appellees have caused to be dismissed by reason of the judgments obtained as above in the Sixth Circuit, the effect of which judgments, as hereinafter shown, was to reduce the amounts which could, in any event, be allowed in this cause, to either of these appellees, to less than $5,000.

In the meantime the appellees were actively pressing their rights in the Sixth Circuit, where the bulk of their property was in use, and where they finally fully succeeded, but not until after the Court in the Seventh Circuit had lost its control of the subject by reason of the appeal and supersedeas in this cause.

To these points of fact, which fully advise the Court of the real state of the record and fairly bring before it the actual questions for decision, it is now proper to add, briefly, these further considerations.

IV. WHILE THE BONDHOLDERS AND THEIR TRUSTEES, IN THE FACE OF SUCCESSIVE DEFAULTS IN INTEREST, FOREBORE TO FORECLOSE THEIR MORTGAGES, IT APPEARS FROM THE STATEMENT OF CERTAIN OF THEIR NUMBER THAT THE NET EARNINGS OF THE IRON RAILROAD, IF NOT OF OTHERS, WERE DIVERTED AND APPROPRIATED TO THE EXPENSE AND IMPROVEMENT OF THE ENTIRE SYSTEM. IN THE REPORT OF SPECIAL MASTER COX, IT APPEARS THAT VALUABLE TERMINALS, BRANCH LINES AND OTHER BETTERMENTS, WERE BEING CONSTANTLY ADDED TO THE PROPERTY DURING THE TWO YEARS OF DEFAULT AND FUNDING. DURING WHICH, IT ALSO PLAINLY APPEARS THAT THE COMPLETED PORTIONS OF THE SYSTEM WERE CONTRIBUTING OF THEIR NET EARNINGS IN AID OF THE UNCOMPLETED PORTIONS WHICH AT THE SAME TIME WERE DOUBTLESS BEING CARRIED FORWARD BY THE SALE OF NEW BONDS

ISSUED IN AID OF SUCH CONSTRUCTION. DURING THE RECEIVERSHIP THE RECEIVER, CRAIG, AT ONE TIME DIVERTED $120,000 OF THE CURRENT INCOME OF THE RECEIVERSHIP UNDER ORDERS OF COURT IN PAYMENT OF OBLIGATIONS INCURRED PRIOR TO THE APPOINTMENT OF THE FIRST RECEIVER (PAGE 121.)

V. UPON REFERENCE TO THE RECORD, PAGE 543, IT WILL BE SEEN THAT IN THE CASE OF THE APPELLEE, THE GRANT LOCOMOTIVE WORKS, AND ITS TRUSTEE, THE AMERICAN LOAN AND TRUST COMPANY, THE AMOUNT FOUND AND REPORTED BY THE MASTER AND ADJUDGED BY THE COURT BELOW, TO BE DUE SAID APPELLEES FOR RENTALS AND REPAIRS ON THE LOCOMOTIVES, "SERIES C," IS, IN THE DIFFERENT FORECLOSURE SUITS, RESPECTIVELY, LESS THAN $5,000. THE SUITS FOR THE FORECLOSURE OF THE MORTGAGES ON THE ST. LOUIS DIVISION AND ON THE TOLEDO DIVISION RESPECTIVELY, ALTHOUGH CONSOLIDATED FOR CONVENIENCE, STAND BETWEEN DIFFERENT PARTIES AND UPON INDEPENDENT RIGHTS.

VI. IN LIKE MANNER THE APPELLEE, R. S. GRANT, FOR REASONS HEREINAFTER STATED, HAVING AND MAKING NO CLAIM AGAINST THE APPELLANT, SAVE AND EXCEPT TO SIX-TENTHS OF THE AMOUNT FOUND BY THE MASTER AND DECREED BY THE COURT BELOW TO BE DUE, SAID APPELLEE NOW SHOWS TO THE COURT THAT THE SAME IS MUCH LESS THAN $5,000 FROM EITHER OF THE SAID DIVISIONS BETWEEN WHICH IT IS APPORTIONED AND CHARGED.

The amounts reported at pages 550 and 551 against the Toledo Division are $3,220.80 and $2,864.51, in all $6,085.31, of which six-tenths would be but $3,651.18.

Against the St. Louis Division the amounts are $3,067.82 and $2,728.57, in all $5,796.39, of which six-tenths would be but $3,447.78.

Thereon it is respectfully submitted to the Court that so much of this appeal as affects these appellees should be dismissed for the want of jurisdiction.

POINTS OF LAW.

I. AS BETWEEN THESE APPELLEES AND THE BONDHOLDERS, IF THERE IS TO BE ANY LOSS, BOTH THE EQUITIES AND THE AUTHORITIES FAVOR THE FORMER.

The legal principle is well settled. "It is the loss of the wrong-doer." In equity it is equally well settled that when one of two innocent parties must suffer, it should be that one who was responsible for the loss. The bondholders made opportunity both for the company and its receivers to do the acts of which appellees complain.

They impliedly assented to the company's acts in contracting the liabilities, and they expressly co-operated in the seizure of the property of these appellees and its retention by the receiver. They should now be estopped to deny the obligations of the receiver in the premises, and must bear any loss resulting from his acts in that behalf.

The receivers stood in the place of the company, and in retaining possession of the locomotives against the demand of the owners, in the interests of the railroad and its bond creditors, at whose suit they were in fact appointed, and whose agents they were, they must be deemed to have done so subject, at least, to the same legal and equitable liabilities that under the like circumstances would have attached to the railway, and precisely in the same measure.

Langdon vs. The Vermont Central R. R. Co.,
53 Vt., 267.

Woodruff vs. Erie Railway Company, 93 N. Y., 623.
Miltonberger vs. Logansport Railroad, 106 U. S., 110.

Nor should the appellees be compelled to take back their property in mitigation of damages.

III., Sutherland, Damages, 530.

Nor is it all material that the property wrongfully withheld earned nothing, and contributed nothing to the assets to be divided.

Woodruff vs. Erie Railway Company, *supra.*

II. IT IS THE SETTLED LAW OF THE LAND THAT ALL THE LIABILITIES OF BANKRUPT RAILWAYS, WITHOUT LIMITATION OF TIME, ARE TO BE PREFERRED AND PAID AHEAD OF THE MORTGAGE INDEBTEDNESS, WHERE, AS IN THIS CAUSE, BONDHOLDERS AND THEIR TRUSTEES, NOTWITHSTANDING REPEATED DEFAULTS IN INTEREST, HAVE ALLOWED THE COMPANY TO APPROPRIATE ITS EARNINGS TO BETTERMENTS AND IMPROVEMENTS, TO OPERATE THE ROAD, AND TO CONTINUE UNCHALLENGED TO INCUR OBLIGATIONS THEREFOR.

Union Trust Company vs. Souther, 107 U. S., 591.
Burnham vs. Bowen, 111 U. S., 776.

On the whole case, it is respectfully urged that the right of these appellees to full compensation is conclusively established.

Finally.

The appellees, The Grant Locomotive Works and R. S. Grant, feel that frankness towards this Court and

their own sense of justice require a statement on their part of the relations between their claims in this cause and those in causes Nos. 1277 to 1280, now under advisement by this Court upon motion to dismiss and to affirm.

The facts are as follows:

These appellees sold, as we have seen, twenty locomotives to the Toledo, Cincinnati and St. Louis Ry. Co. or to its constituent corporations.

The Grant Locomotive Works asserted its claims for its ten locomotives in the foreclosure proceedings in the Southern District of Ohio, and R. S. Grant asserted his claims in the same tribunal for four out of his ten locomotives. These proceedings resulted in the decrees appealed from in the said causes Nos. 1277 to 1280. By these decrees these appellees were awarded the purchase price of the said fourteen out of their twenty locomotives, and if these decrees are affirmed these appellees will receive full compensation for the fourteen locomotives.

The decrees appealed from in this cause were made before the claims of these appellees before the Court in Ohio were finally determined. During the proceedings in the court below these appellees insisted that, as to the said fourteen locomotives, they were entitled to exactly the relief which they ultimately obtained in the Ohio Court, and protested against any action adverse to such position. Nevertheless, the decrees below ignored the rights so claimed, and awarded these appellees compensation by way of rentals for all their twenty locomotives, while denying their claims for the purchase price of any of the locomotives.

The compensation thus awarded these appellees was distributed by the decree below, not according to the Divisions of the railway on which the locomotives had been used, but altogether upon a mileage basis between the different Divisions of the Toledo, Cincinnati and

St. Louis consolidated railway. It results, therefore, that these appellees were awarded, in this cause, compensation out of the proceeds of the sale of Divisions outside of Ohio, for the use of the fourteen locomotives, which are the subject of the relief awarded to them in the Ohio litigation appearing in this Court in the said causes Nos. 1277 to 1280.

As has been said the final decision in the Ohio cases was made after the decree now appealed from. In fact, the appeal and supersedeas herein were perfected before the final decisions by Mr. Justice MATTHEWS and Judge JACKSON in Ohio, and these appellees had no opportunity to have made any suitable modification of the decree here appealed from. The consequence is that if the decrees appealed from in causes No. 1277 to 1280 are affirmed, then the appellee, the Grant Locomotive Works, desires no benefit from the decree here appealed from; and the appellee R. S. Grant desires to avail himself of only six-tenths of the amount awarded him by the said decree, so covering the six out of his ten locomotives which were not covered by the decrees in Ohio.

These appellees, therefore, while not feeling themselves called upon formally to confess any error in the decree below, so long as appeals are still pending as to the decrees in the Ohio litigation, still desire to be understood as disavowing any claim to double relief. They are ready to make any proper stipulation to abate their claims under the decree herein to the extent to which they receive relief under the decrees in causes Nos. 1277 to 1280, and the appellants may treat this statement as a stipulation for that purpose.

Respectfully submitted,

BLUFORD WILSON,

Counsel for R. S. Grant and The American Loan and Trust Company and the Grant Locomotive Works, Appellees.

Springfield, Illinois, April 3, 1890.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1889.

NUMBERS 252 AND 1537.

SYLVESTER H. KNEELAND, Appellant, vs. THE AMERICAN LOAN AND TRUST COMPANY and others.	No. 252.
SYLVESTER H. KNEELAND, Appellant, vs. GEORGE WILLIAM BALLOU, Trustee.	No. 1537.

Petition for Rehearing.

I feel satisfied that in my argument before the Court, I failed to state with sufficient clearness several points which seem to me of great importance for appellant,

and for this reason I feel it my duty to ask for a reargument.

I.

In these cases the claims were divided into classes. The rentals charged for use of cars from the 1st of August, 1883, to the 1st of December, 1883.

During that period the cars were used by the Receiver appointed in what is known as the Braman suit. That bill was filed by a judgment creditor, and this Court holds that such rentals could not be given priority over the mortgage debts, giving as the reasons that there were no surplus earnings; that the Receivership was at the instance of a judgment creditor with a view of reaching surplus earnings—that the suit was not at the instance of mortgages, as they were asking nothing at the hands of the Court; that the rolling stock was not included in the sale, but was returned to the intervenors upon orders entered prior to the decree of sale—so that the intervenors cannot say that their property was sold, or that by such fact they have an interest in the proceeds of sale; that the sale realized only a small proportion of the mortgage debts; and that during the four months no demand for possession or rental was made on the Receiver by any of the intervenors.

This Court also holds that those who had made a conditional sale of the cars had a lien upon the cars, as the holders of the mortgages had a lien upon the railroad, and that both parties had the right to enforce their lien.

II.

The second class embraces the rentals after the 1st day of December, 1883, when the cars passed into the possession of the Receiver appointed in the suit brought by the Central Trust Company, mortgagee, for the purpose of foreclosing the mortgage.

This Court says that in respect to the question here involved, the case is as though judicial proceedings were commenced on the 1st of December, 1883. It seems to us that there is a difference, and an important one. At the time the mortgagees commenced suits to foreclose, the property was already in the hands of a Receiver. It had so remained for about four months without any objection on the part of the appellees, they intending to get the full value of the cars. At that time the Railroad Company was not in possession of these cars—they were in the possession of a Receiver appointed at the request of a judgment creditor. The mortgagees asked for no change of situation; they simply asked that the receivership be extended over all the property covered by their mortgage. The opinion filed seems to take the ground that the mortgagees asked that a Receiver take possession of this rolling stock. The facts are as follows:

The first bill filed by the Central Trust Company was on the 20th day of October, 1883 (p. 25 of the Record). This was a bill to foreclose a mortgage covering the property from Toledo to Kokomo.

On page 33 is the following:

> "And until said sale, that a Receiver may be appointed of all and singular the premises and prop-

> erty aforesaid *embraced within the said mortgage* or deed of trust hereinbefore set forth."

It was not contended at that time, and never has been contended that the mortgages sought to be foreclosed covered any of the cars in question.

On page 72 of the record in case No. 252 is the following:

> "Now, on motion of Thomas E. Stillman, solictor for the said Central Trust Company, it is ordered that the Receivership already existing under the order heretofore entered is hereby extended over and made *to apply to the premises and property sought to be foreclosed in this action.*"

"The Receivership already existing" was the Receivership created by the Braman suit, and this was "extended over and made to apply to the premises and property sought to be foreclosed" in the action by the Central Trust Company.

It is not pretended that the mortgage covered the cars belonging to the appellees; and the only object was to foreclose the mortgage and sell the property that was covered by it, and the Receivorship was extended over and made to apply to all property covered by the mortgage.

At this time the cars in question were in the possession of Edward E. Dwight, the Receiver appointed in the Braman suit, and he turned this property over to his successor. No contract had been entered into between Dwight and the appellees, nor was any contract ever entered into between the appellees and any Receiver.

The appellees had never demanded possession of the cars or rent for their use.

The Central Trust Company filed its bill and the matter was brought up on the 27th day of November, 1883, and such proceedings were had that the property was turned over to William J. Craig, Receiver, on the 1st of December following.

On the 8th day of December (see p. 74 of the Record in No. 252), the appellee, David B. Paul, filed his petition, in which, after setting out the contract, lease or conditional sale, he asks (p. 81) "that an order be entered in this cause requiring the Receiver to forthwith pay to the petitioner the sum of $50,000, being the amount of such rental due and matured on the 1st day of August, 1883, as evidenced by 50 bonds," and that the Receiver "be further ordered and directed to pay to petitioner the installments of interest on said rentals maturing on the 1st day of August, 1883; *and that the Receiver be further ordered and directed to promptly pay the remaining installments as evidenced by the remainder of the bonds;* and that the Receiver be ordered to faithfully execute and carry out all and singular the undertakings of the defendant company, as set forth in the bonds and coupons and leases." And the petitioner asks that all this be done *without prejudice to his right to retake possession of the rolling stock.*

He asked for no rental—for no contract nor for the payment of rental—he simply asked for an order on the Receiver to carry out the original contract, and pay what was then due, and he asked this without prejudice to his own right to re-take the cars at any time.

As a matter of fact, he did not want cars. There were no other roads upon which they could be used.

They were narrow-gauge. The system had fallen into disfavor and bankruptcy. And what the petitioner wanted was to force the Receiver to carry out the original car contract so that the company should keep the cars and the petitioner should get his money.

On the 14th of March, 1884, David B. Paul again petitions the Court on behalf of the Massachusett Car Trust, Series B and G, and this petition is substantially the same as the one already quoted, in that he asks that the Receiver be compelled to carry out the contracts, and he asks that this be done *without prejudice to his right to retake possession of all the cars* (pp. 105 to 112).

So the United States Rolling Stock Company (p. 112) filed exactly the same kind of petition, asking for the same relief, *without prejudice to its right to retake possession.*

So the Pennock Brothers, appellees (p. 169) in June, 1884, filed their petition (Massachusetts Car Trust, Series E) in exactly the same form, asking for the same relief *without prejudice to their rights to retake possession.*

The Pennock Brothers again petitioned (p. 174) for exactly the same relief; and this was in June, 1884.

On the 27th of June, 1884 (p. 182), the American Loan and Trust Conmpany filed its petition; and for the first time anything is said about the use of these cars. This is found on page 186, as follows:

> "That the possession and use of the said railroad equipment and rolling stock was and still is necessary to enable the Receiver to keep the said railroad in operation. In consideration whereof your petitioner prays first, that it may be allowed

to take possession of the rolling stock and equipment delivered under the Boston Car Trust leases series F, G, I, K and L, and the Massachusetts Car Trust series D, and remove the same from the railroad now in the hands of the Receiver; second, that it may be paid from the earnings of said railroad while in the hands of the Receiver as aforesaid, or, if insufficient to pay the same, from the proceeds of any sale thereof decreed in this cause, a reasonable rental for the use of said rolling stock and equipment as has been used on said railroad during the time said defendant railroad has been in possession of the Receiver, and also a reasonable rental therefor for such time prior thereto as it may be entitled to recover."

This, it will be remembered, was in June, 1884. All parties were equally informed as to the condition of the property, and all parties knew it was impossible to use the cars. On December 1st, 1884, Judges GRESHAM and WOODS made an order in regard to the leased equipment in which is found the following:

"FIRST. That the several contracts under which the intervening petitioner and other holders of Car Trust leases delivered the cars and equipments mentioned and set forth in their intervening petitions, in exception to the Master's report and in testimony taken, were and are contracts of conditional purchase and sale of said equipment.

"SECOND. *That no such demand has been made by said intervening petitioners or other holders of Car Trust leases, or any or either of them, to retake possession of their said engines, cars or equipment, and no such refusal to grant possession thereof has been made by the Court or its Receiver* as to work a conversion of such engines, cars or equipment or

any part thereof, and that there is no legal or equitable obligation resting upon the Court and its Receiver to specifically comply with the terms and obligations of said contract of conditional purchase and sale.

"THIRD. That said intervening petitioners and other holders of Car Trust leases and each of them *are entitled to immediate possession of said engines, cars and equipments.*"

And thereupon it was ordered that the rolling stock be returned.

III.

There is one fact which, it seems to us, was overlooked by the Court. The appellant is held liable in this case because a Receiver was appointed at the request of the mortgagees and that such Receiver took possession under order of the Court.

This system of narrow gauge railway was composed of several divisions, and the main line consisted of two divisions. The Toledo division extended from Toledo to Kokomo; and the St. Louis division extended from East St. Louis to Kokomo. All the rentals found due were divided between these divisions, each paying in proportion to its length, Now, the division known as the St. Louis division was covered by a mortgage to secure 3,000 bonds of the denomination of $1,000 each.

On the 17th day of June, 1884, the Central Trust Company, being the mortgagee, filed its bill to foreclose that mortgage, but under that bill no Receiver was ap-

pointed and no order made of any kind, sort or description on that subject by the Court.

So that, as a matter of fact, no Receiver was ever appointed of this property except in the Braman bill. And as a matter of fact, no bill was filed by the mortgagees for the foreclosure of the mortgage until the 17th day of June, 1884, and on the filing of that bill no action was taken as to the appointment of a Receiver or as to extending any Receivership theretofore made over that division. So that, it seems to us, according to the decision made in this case by the this Court on the first class of claims mentioned, this division should not be compelled to pay any proportion of said rentals. Yet the judgment is that the St. Louis division pay for the eight months from December 1st, 1883, to August 1st, 1884, $34,026.50, and for the five months from August 1st, 1884, to January 1st, 1885, $26,209.53. As a matter of fact, this division remains in the first class—no Receiver ever having been appointed under the bill filed by the mortgagee, and, as a matter of fact, no bill was filed until June 17, 1884.

Another fact must, it seems to us, be taken into consideration. On all other divisions, except the St. Louis division, bills were filed by the trustee, and by order of the Court the receivership established under the Braman bill was extendsd to these divisions, and, as a matter of fact, to all divisions except the division from Kokomo, Indiana, to East St. Louis, Illinois. So that the only receivership existing upon that division was that created by the Broman bill and the order of the Court in that suit—that is to say, the only Receiver

was appointed in the suit brought by an unsecured creditor.

Now, if none of the divisions are liable for the four months from August 1st, 1883, to December 1st, 1883, during which the receivership existed under the Braman bill, and if then these divisions became liable because the mortgagees about the 1st day of December, 1883, filed their bills to foreclose, then it seems to us absolutely certain that if the mortgagee did not file a bill to foreclose the mortgage covering the St. Louis division until the 17th of June, 1884, and no Receiver was ever appointed for that division at the request of mortgagees, and if it further appears that in none of the other foreclosure proceedings the receivership created in the foreclosure proceedings was extended over the St. Louis division, then it seems to us that the St. Louis division should not pay.

IV.

Upon the question as to whether the appellee should be paid on a basis of actual use, or a reasonable rental irrespective of actual use, in deciding that a rental should be paid irrespective of actual use, this Court, said:

> "The initiative in the matter was taken by the real estate mortgagees. They ask by their bill that the Court take possession of all the personalty. If more was taken possession of than was needed, it was their mistake."

It seems to us that the initiative in the matter was

taken by the judgment creditor, and that the real estate mortgagees, as a matter of fact, asked only that the Court take possession of the property covered by the mortgage. In the bill filed by the Central Trust Company to foreclose the mortgage on the main line from Toledo to Kokomo, is the following :

> "And that meanwhile, and until such sale, a Receiver may be appointed *of all and singular the premises and property aforesaid embraced within the said mortgage* or deed of trust hereinbefore set forth."

Can it be said that the Trustees asked in that bill that the Court take possession of all the personality *i. e.*, of all the rolling stock ?

In the bill filed to foreclose the mortgage on the St. Louis division, although a Receiver was asked for, none was appointed, and no receivership extended over that portion of the road. Besides, that bill was not filed until the 17th of June, 1884. Under these circumstances can it be said that all the cars were necessary because the mortgagees asked that all property be taken possession of that the mortgage embraced, and that, therefore, the rental value is to be paid for all.

No rental was claimed. The appellees claimed their money on the contract. As a matter of fact, the Master to whom the question was referred, found that the narrow gauge roads were being abandoned. This fact sheds light on the conduct of the appellees. They wanted their pay according to the contract. They were not willing to rent the cars to the Receiver on any terms because they wanted to keep their right intact to retake the cars. It was not for the Court to take any

action. These appellees had placed the cars in the possession of the Railroad Company voluntarily. Then under the Braman bill they passed to the hands of a Receiver without objection on the part of the appellees, and then, when a Receiver was appointed in the foreclosure suits, these cars were in the possession of the former Receiver and by him turned over. The mortgagees did not ask for these cars—they only asked for property covered by the mortgage.

So it seems to us that the most for which appellant could be liable would be for the actual use. There was no contract of rental. There was no contract of any kind, and consequently appellant should be bound only for the actual use.

If we are right in the facts, then it seems to us that so far as the St. Louis division is concerned there should be no rentals charged, for the reasons given. The rolling stock was not included in the sale, and was returned to the appellees on orders entered prior to the decree of sale. So that only that property was sold which was covered by the mortgages executed prior to any contract with the appellees with respect to rolling stock, and this property was taken possession of simply because it was in the possession of the company and it was placed there by the appellees themselves. As a matter of fact, efforts were made to compel the appellees to remove their cars; but owing to the resignation of Judge DRUMMOND the proper order could not be obtained; but the moment Judge GRESHAM was appointed and confirmed, the order was made and the cars removed.

The Honorable Jacob D. Cox, to whom the ques-

tion of rental was submitted, finds (p. 212) that the appellees could not have found a market for this rolling stock if thrown upon the market, as a consequence of the failure of this narrow gauge system. He also finds, at the same time, that the railroad companies could not have found other similar rolling stock to take its place if deprived of it.

Under this finding it is clear that the appellees did not wish to take their cars. Their idea was to leave them and to enforce the original contract.

Under these circumstances can it be said that the Receiver was bound to take them all and to pay rental for all, or should he pay for the cars used and in proportion to the use?

The Master found, at the same time, that the rolling stock was depreciated (p. 213), that it would require on the average a thousand dollars a locomotive to put them in working condition, and that it would require an average of twenty dollars a car for all the cars included in the car trust to put them in working condition.

I most respectfully suggest that these facts should be taken into consideration in fixing the price to be paid, and that on the reversal of these cases the Court below should be allowed to hear testimony upon this branch of the case.

There is a vast difference between paying what the Master found to be a reasonable rental for all the cars used and not used, and payment for the cars used according to use. The Master gave $6 a month for flat cars, $7 a month for coal cars and gondoliers, $12 a month for stock cars, $18 a month for box cars. On the

mileage basis, these cars would bring less than $2 a month, without adding the amount expended in repairs to put the cars in working condition. According to the Master's report it required an amount to be spent in the repair of the cars equal to two or three months rental. In any event, it seems that such amount should be deducted.

The appellees knew that nothing could be paid out of the earnings. They also knew that if they took their rolling stock from the track they could not lease it to any other road, and they knew that it was not being profitably used by the Receiver. Under these circumstances they made no demand for the property, they asked no contract for rental or use, but simply endeavored to enforce the original contract.

V.

I feel that the facts were not stated with clearness. That the difference between the St. Louis division and the others was not pointed out in a manner to be clearly understood by the Court. And I also feel that counsel for appellant did not call the attention of the Court to the facts in connection with the prayer of the trustees in the foreclosure suit as to the appointment of a Receiver.

I cannot but feel that if the case had as to these mat-

ters been properly presented the Court might have reached a different conclusion. And I therefore most respectfully pray the Court that another opportunity may be given to present the case of the appellant upon the points suggested.

Very respectfully,

ROBERT G. INGERSOLL,

Of Counsel for Appellant.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

No. 1537.

SYLVESTER H. KNEELAND, *Appellant*,
vs.
GEORGE WILLIAM BALLOU, TRUSTEE, *Appellee*.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF AND ARGUMENT FOR APPELLEE.

This is an appeal by Sylvester H. Kneeland, as purchaser, under foreclosure sales, of two divisions of the Toledo, Cincinnati and St. Louis Railroad, from a decree of the Circuit court for the district of Indiana, awarding to appellee priority over first-mortgage bonds in payment of rentals for the use of rolling stock by the receivers of the road. This appeal is an adjunct of the case of *Sylvester H. Kneeland, appellant*, v. *The American Loan and Trust Company, of Boston, et al., appellees*, No. 252 of the present calendar. The claims for the use of rolling stock, embraced in this appeal and in No. 252, are identical in their character, being against the same divis-

ions of the railroad for the use by the receivers of rolling stock held under car-trust leases of the same character, and during the same period. All of the claims of the holders of car trusts arose upon petitions of intervention in the foreclosure proceedings. The claims of appellees in No. 252 were ripe for hearing, and reached a final judgment in the Circuit court April 5, 1886. At the date of that judgment proof had not been completed on the claim of Ballou, the appellee herein, and his case did not reach a final judgment until November 9, 1889. This appeal, therefore, is but a continuation or branch of the former appeal, the case of Ballou having been heard upon the testimony already before the court upon the hearing of the former cases, with such additional testimony as was offered by the parties upon this branch of the case.

In view of the substantial identity of the two cases, counsel for all the parties in interest in both cases have filed herein the following stipulation:

"It is hereby stipulated and agreed by the parties hereto that the above entitled case and the case of *Sylvester H. Kneeland, appellant*, v. *The American Loan and Trust Company of Boston, et al.*, involving the same questions, shall, by leave of the court, be heard together and argued as one case; such hearing to be had when said last named case, No. 252 of the October term, 1889, is reached in due course."

The order of the Circuit court of November 9, 1889, fixing the amount of the Ballou claim for car rentals, also established the claim of the Railroad Equipment Company, another intervenor, from both which allowances Kneeland prayed and was allowed an appeal. The appeal in the case of the Railroad Equipment Company has not been perfected, counsel for the respective parties

having stipulated that the judgment of the Circuit court in that case shall abide the result of the judgment of this court in No. 252, and in the present case. The order of November 9, 1889, establishing the claims of Ballou and of the Railroad Equipment Company, contains the following stipulation (Record, 35):

"And thereupon it is stipulated in open court by counsel for the respective parties, that if the said Kneeland shall perfect either of said appeals and shall file a transcript of record thereon in the Supreme court of the United States, upon the hearing of such appeals in said Supreme court either party thereto shall be at liberty to use so much of the transcript of the record as he may deem material in the cause of Sylvester H. Kneeland, appellant, against The American Loan and Trust Company of Boston, and others, appellees, now pending on appeal in said Supreme court, and numbered 252 of the October term, A. D. 1889, of said court, and for that purpose such portions of the transcript of record in said cause numbered 252 shall be taken and considered as part of the evidence introduced upon the hearing before the master in this cause."

The record in No. 252 being thus by stipulation regarded as having been offered in evidence upon the hearing before the master in this cause, it is not deemed necessary to restate in this argument the material facts of that record. A full statement of such facts forms a part of the brief and argument of the undersigned, as counsel for David B. Paul, trustee, and for the United States Rolling Stock Company, appellees, in No. 252, to which statement reference is hereby made, and the court is respectfully asked to consider that statement as a part of this. It is only necessary, therefore, to here state such additional facts as pertain specially to the case of the appellee herein, and which do not appear in the record in No. 252.

In 1880 and 1881 the firm of George William Ballou

& Company were bankers doing business in the city of New York and Boston. During those years they purchased and paid for the rolling stock in controversy in this cause, and leased the same to the Toledo, Delphos and Burlington Railroad Company, one of the constituent companies merged in the consolidated company finally known as the Toledo, Cincinnati and St. Louis Railroad Company. These leases were five in number, and were known as Boston Car Trust, Series A, B, C, D and E, respectively. The leases were executed on the following dates: Boston Car Trust Series A, June 1, 1880; Series B, November 1, 1880; Series C, November 1, 1880; Series D, October 1, 1880; Series E, April 1, 1881. By these leases the firm of Ballou & Company leased to the Railroad Company the following equipment:

Locomotives	22
Box freight cars	320
Flat cars	280
Transfer trucks	222
Passenger cars	13
Combination cars	2
Baggage and express cars	4
Coal cars	124
	987

By subsequent arrangement between the parties 70 of the box cars and 23 of the transfer trucks embraced in Series B were not delivered to the company, thus reducing the number of box freight cars actually leased and delivered to 250, and the number of transfer trucks to 200.

All of the equipment in question was manufactured in accordance with the specifications of the officers of the railroad company, and was paid for by Ballou and Company,

and by them delivered to the railroad company at or shortly after the dates of the respective leases (Record, pp. 69 and 70). It was used indiscriminately upon all of the eight divisions of the road from the date of its delivery to the appointment of Edward E. Dwight as receiver under the creditors bill of *Grenville D. Braman*, August 2, 1883. Upon the appointment of the receiver, he took possession of this rolling stock, excepting such as had been destroyed, and he and his successor, Craig, continued to use it indiscriminately upon all the divisions of the road down to January 1, 1885, when it was returned to the owners by an order of the Circuit court entered December 1, 1884 (Record, No. 252, p. 301).

The five leases in question are in the ordinary form of car-trust leases, being substantially identical with those involved in No. 252, and they are set forth in this record at pages 203 to 208, inclusive. By the terms of these leases the rental, which was the equivalent of the purchase price of the cars in the event of full payment, was distributed through a series of ten annual payments, evidenced by car-trust bonds of the respective series, with coupons for semi-annual interest at the rate of seven per cent. per annum. No payment has ever been made of any portion of the rental stipulated in either of the five leases, except the sum of $2,200 paid on account of the lease series A (Record, 69). The car-trust or equipment bonds secured by these leases were negotiable in terms, and were sold to investors and scattered throughout the New England states, where they are held in small amounts by savings banks and investors, all being in the hands of innocent holders (Record, 69).

By each of the five leases in question, it was provided that for the further protection of the holders of the equip-

ment bonds, the lessors, George William Ballou and Company, contemporaneously with the execution of the lease, should assign the same and all of their interest therein, to George William Ballou and F. M. Holmes, as trustees for the holders of the equipment bonds. (Record, 204.) Each of the leases was thereupon and on the day of its execution duly assigned by the firm of Ballou and Company to George William Ballou and F. M. Holmes, as such trustees, who endorsed their acceptance of the trust on each of the leases. (Record, 207.) Holmes died, September 13, 1884, and Ballou thereafter acted as sole surviving trustee under the leases and assignments above set forth. As such trustee, January 7, 1886, he filed his petition of intervention in the foreclosure cases against the railroad company in the Circuit court for the district of Indiana, being the same actions set forth in the record in No. 252, for the foreclosure of the mortgages upon the two divisions of the railroad known as the Toledo Division and the St. Louis Division. This petition (Record, 1–21), sets forth the history of the five equipment leases in question; the assignment of the leases to the trustees; the delivery of the equipment to the railroad company; its use by the company and by the receivers down to January 1, 1885, and the loss and destruction of some of the cars and locomotives and the damaged condition of others. The petition prays for an accounting and for payment of a reasonable rental for the use of the rolling stock and payment for necessary repairs and for all equipment which had been destroyed while in the service of the receivers.

Special Master Cox, to whom all the car-trust claims were originally referred, reported certain rates of monthly rental as a fair allowance for the use of the rolling stock during the receivership. (Record, No. 252, page 212.)

These rentals were twice reduced by the Circuit court, the average reduction first made being about thirty-five per cent., the court adopting, however, the percentage of apportionment of the rentals among the eight divisions of the road as found by special Master Cox. (Record No. 252, pages 434 to 436, inclusive.) By the same order a reference was had to William P. Fishback, as master, to report the amount due in accordance with that order to each petitioner and owner of cars and locomotives, for rentals and repairs and for cars destroyed. The master having reported as to some of the car-trusts (Record No. 252, page 488), the court, by a subsequent order (Record No. 252, pages 535 to 537), directed certain modifications to be made in the master's findings, and made a further reduction in the rentals of fifteen per cent., the ratio of distribution among the different divisions remaining unchanged. It was also provided by this order that the rate of rentals, method of computation and distribution therein fixed should apply to all subsequent reports upon car and equipment rentals, repairs and equipment destroyed.

Under these orders, and upon the testimony taken before special Master Cox (Record, No. 252, pages 608 to 802) and before special Master J. E. Rogers, concerning repairs (Record, No. 252, pages 802 to 1057), and upon the additional testimony specially pertaining to the intervening petition of Ballou (Record, pages 38 to 178), the cause was heard before Master Fishback.

December 21, 1888, the master's report was filed (Record, pages 22 to 30). The master reports that he has proceeded in conformity with the various orders of the court above mentioned, and that he has made the fifteen per cent. reduction in rentals as directed by the order of February 8, 1886. He states that the method

of computation of the amounts due is the same as set forth in detail in his report of December 7, 1885, (Record, No. 252, pages 488 to 500). He finds that the entire amount due to petitioner for rentals, repairs and value of cars destroyed for the twelve months from August 1, 1883, to August 1, 1884, the date of the delivery by the receiver of the Ohio divisions of the road to the purchasers under foreclosure, is $69,714.07. Of this amount $37,053.03 had previously been reported to be paid by the Ohio divisions under orders of reference made in the foreclosure proceedings in Ohio. He finds the amount due from the Toledo Division during the period in question upon the percentage of distribution adopted throughout the entire case to be $16,584.98, and from the St. Louis Division $15,797.22. For the period of five months from August 1, 1884, to January 1, 1885, being the period in which the cars were used by the receiver on the Toledo, and St. Louis Divisions until their surrender to the owners upon the last named date, he finds the amount due from the Toledo Division to be $14,018.43, and from the St. Louis Division $13,333.13. These amounts he finds should be paid by the two divisions respectively in the proportions named before payment of any of the mortgage indebtedness.

No exceptions were filed to this report until November 9, 1889, when Sylvester H. Kneeland, as purchaser of the Toledo and St. Louis divisions, was granted leave to file exceptions and the same were accordingly filed on that date. (Record, 30.) Upon the same day a final hearing was had upon the master's report and the exceptions of Kneeland thereto, and the exceptions were overruled and the master's report was confirmed. (Record, 33.) A final decree was thereupon entered awarding payment to the petitioner of the amounts found by the

master to be due from the Toledo and the St. Louis divisions respectively, as above set forth, the aggregate amount so awarded against the two divisions for the entire period from August 1, 1883, to January 1, 1885, being $59,753.75. This amount was adjudged to be a prior and paramount lien upon all the railroad property and effects of the divisions in question, prior to the rights of the bondholders and purchaser, and of all persons claiming under them, to be paid out of the proceeds of the foreclosure sale of the divisions prior to any distribution of such proceeds among the holders of the mortgage bonds. It was further decreed that Kneeland, as purchaser of each of said divisions should, within twenty days, pay the amounts so found due as a part of the purchase price due from him upon the sale of such divisions, the court reserving the right, in the event of default in such payment, to resume possession of the property so sold to Kneeland upon the terms mentioned in the order confirming the sale and approving the conveyance. From this decree Kneeland, describing himself as "such purchaser and bondholder," prayed and was allowed an appeal, and filed a supersedeas bond.

Brief of the Argument.

The rights of appellee in this cause stand upon precisely the same footing as the rights of appellees in *Kneeland* v. *American Loan and Trust Company*, No. 252 of the present calendar. The stipulation of counsel that this case may be heard with that, and upon the same record is, subject to the approval of the court, substantially a consolidation of the two appeals. The suggestions made by the undersigned in his printed argument in behalf of David B. Paul, trustee, and of the United States Rolling Stock Company, appellees in No. 252, are equally applicable to the present case. This case, like that, presents the question whether Kneeland, as purchaser under the foreclosure sales, had any appealable interest in the matters here in controversy; the failure of any parties in interest to file objections to the reports of the masters before they were returned into court; the continuous character of the Dwight and Craig receiverships from August 1, 1883, to January 1, 1885; the priority of receiver's indebtedness over the claims of mortgage bondholders irrespective of the question of diversion of current income, and, generally, all the legal questions there involved. It is, therefore, deemed unnecessary to repeat here the suggestions made in the former argument, and the court is asked to consider the points and authorities there cited as applicable to the present case.

In one respect the right of Kneeland as purchaser to challenge the decree fixing the amount due to appellee stands upon even a more slender foundation than in No.

252. The master's report upon Ballou's petition of intervention was filed December 21, 1888. (Record, 22.) No objections had been taken to the report before it was returned into court. No exceptions were filed by appellant to this report until November 9, 1889, nearly a year after the filing of the report. The record upon that day (Record, 30), recites that Kneeland prayed leave to file exceptions to the master's report of December 21, 1888, which leave was granted, and the exceptions were accordingly filed.

The eighty-third of the equity rules gives to the parties in a chancery cause one month from the time of filing a master's report to file exceptions thereto. The rule then provides that, "if no exceptions are within that period "filed by either party, the report shall stand confirmed "upon the next rule day after the month has expired." No exceptions were filed within the thirty days, and many rule days passed before leave was asked to file exceptions. The report was, therefore, under the rule, absolutely confirmed, and the court was powerless to permit the filing of exceptions a year thereafter, or to consider such exceptions when filed. Upon the failure to file exceptions within the thirty days, the eighty-third rule confirms the report upon the next rule day as absolutely as if a solemn decree of confirmation were entered of record by the court itself. The only possible procedure by which such confirmation could be set aside would be by an application to the court for that purpose, and it may well be doubted whether such an application could be entertained at a subsequent term of court. In any event no such application was made in this instance. Kneeland, therefore, occupies the position of seeking by his appeal to question the correctness of a decree based upon the

findings of the master to which he has never excepted, all which findings were absolutely confirmed by his failure to except within the prescribed period. And this court has so often held that the findings of a master can not be questioned here for the first time, when no exceptions were filed to his report in the court below, that citations upon this point are superfluous.

Considerable proof was offered before the master for the apparent purpose of showing that the transfer trucks were not all in continuous use by the receivers during the period for which rental was charged. It is sufficient upon this point to say that the testimony of receiver Craig (Record, No. 252, page 611), that all of the rolling stock upon the road was necessary for its proper management and operation, has never been questioned by any witness in the case. And whether used or unused, the trucks, like all the other equipment, remained in the possession of the receivers, and were never surrendered to us until after January 1, 1885. The rental allowed by the master for the trucks, is at the rate of $1.25 per month for each truck. Appellant can not complain of this amount, since it is much less than was warranted by the testimony (see testimony of King, Record, 76).

If the percentage of distribution of the rentals among the various divisions of the road is open to question, by appellant in this court, the attention of the court is asked to the report of special Master Cox (Record, No. 252, page 214), who reports a table of percentages for the distribution of car rentals for the eight different divisions of the road. This table of percentages is based upon a careful computation of car mileage made by the accounting officers of the receiver, which the master finds to be accurate, as based upon the actual

performance of cars from November 1, 1883, to May 1, 1884. It is the basis of distribution adopted in all subsequent proceedings throughout the litigation, and was approved by the Circuit court, and the order of reference to Master Fishback directed him to follow this computation, which he did in all of his reports upon car rentals. No more fair and just basis of distribution can possibly be conceived, and indeed no proof was ever offered questioning its correctness or even suggesting a more equitable rule of apportionment among the several divisions.

Some testimony was offered before the master as to the mileage made by a portion of the cars embraced in the Ballou leases, with computations as to the amount earned by some of these cars during a part of the period in question upon the basis of one-half cent per mile for loaded cars, allowing nothing for empty cars, and it may be contended by appellant that a mileage basis should have been adopted instead of a monthly rental. It seems only necessary upon this point to say that no testimony whatever was adduced before any of the masters as to what was a reasonable rental upon the mileage basis, whether for loaded or empty cars, and that no data were presented to the master from which rental upon the basis of actual mileage could be even approximated, the entire testimony proceeding upon the theory of monthly rental upon a *quantum meruit*. Even the tables of partial mileage, presented by the witness Neal McKinnon (Record, pages 123 to 134), are confessedly incomplete, both as to the period covered by the computations, and as to the cars embraced therein. McKinnon admits (page 124) that no record of the cars was kept in September, October and November, 1883. His tables terminate with July 31, 1884, while our equipment continued to be used

by the receiver five months later and until January 1, 1885. In his Exhibit 3 of mileage, he purports to give only the mileage of the coal-cars in Boston Car Trust, series C. These numbered only twenty-four, and he wholly omits any reference to the mileage made by the 100 coal-cars in series E. In his table of mileage of box-cars he gives only the mileage made by the box-cars in series A, C and D, entirely omitting the forty box-cars in series E. And in Exhibit No. 7, being his final computation of rentals upon the mileage basis (Record, 134), he computes only the rentals due for freight-cars in four out of the five leases, and wholly omits all other classes of cars in any and all of the leases. It is inconceivable that the patience of this court should be taxed to the extent of spelling and guessing out from these garbled, mutilated and imperfect data what was the actual mileage of even a portion of the cars in question for even a portion of the time in controversy, especially when no proof was offered as to what would be a fair rental upon the mileage basis.

Pages 179 to 203 of the record contain a most extraordinary document, entitled, "Toledo, Cincinnati and St. "Louis R. R. A Statement by the Receiver." This production is unsigned and undated, and was never offered in evidence by any party to the cause. It is not identified as an exhibit, or otherwise. By what mysterious agency it came to be copied by the clerk as a part of the transcript of the record is inconceivable. As a literary product by an anonymous writer it appears to have some merit. It is not perceived that it has any connection with the case at bar, and it certainly forms no part of the record.

The brief suggestions here made are believed to cover

such minor points of difference as may exist between this case and No. 252. In all substantial respects the cases are essentially identical. The case of the appellee herein is therefore submitted upon the foregoing suggestions, together with the argument of the undersigned in No. 252, which the court is asked to consider as a part of this argument.

Respectfully submitted.

J. L. HIGH,
Counsel for Appellee.

CHICAGO, March, 1890.